TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1960

No. 225

WILLIAM MARCUS, ET AL., PETITIONERS,

vs.

SEARCH WARRANT OF PROPERTY AT 104 EAST TENTH STREET, KANSAS CITY, MISSOURI, ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSOURI

FILED JULY 11, 1960

JURISDICTION POSTPONED OCTOBER 10, 1960

SUPREME COURT OF THE UNITED STATES

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INDEX

RECORD PRESS, PRINTERS, NEW YORK, N. Y., NOVEMBER 29, 1960

[fol. 1]

IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI, AT KANSAS CITY

DIVISION NO. 9

IN RE: SEARCH WARRANT OF PROPERTY AT 5 WEST 12TH STREET, KANSAS CITY, MISSOURI	No. 1000
IN RE: SEARCH WARRANT OF PROPERTY AT 3105 EUCLID, KANSAS CITY, MISSOURI	No. 1001
IN RE: SEARCH WARRANT OF PROPERTY AT 1 EAST 39TH STREET, KANSAS CITY, MISSOURI	No. 1002
IN RE: SEARCH WARRANT OF PROPERTY AT 123 EAST 12TH STREET, KANSAS CITY, MISSOURI	No. 1003
IN RE: SEARCH WARRANT OF PROPERTY AT 104 EAST 10TH STREET, KANSAS CITY, MISSOURI	No. 1004

[fol. 1a]

IN RE: SEARCH WARRANT OF PROPERTY AT 221 EAST 12TH STREET, KANSAS CITY, MISSOURI	No. 1005

[fol. 2]

STIPULATION OF COUNSEL RE RECORD

Loeb H. Granoff, an Assistant Prosecuting Attorney for Jackson County, Missouri, on behalf of the State of Missouri, Morris A. Shenker and Louis Wagner, attorneys for Ted's News Shop, Jack's News Stand, Title News Company, Town Book Store, Ruback's News Stand, Kansas City Distributors and Homer Smay, do hereby stipulate and agree in order to avoid duplicity of exhibits offered in evidence and pleadings filed by Appellants, that the following shall be contained in the transcript of appeal to the Supreme Court of Missouri:

1. Complaint for Search Warrant marked Exhibit "F", attached hereto.

2. Copy of Search Warrant authorizing search for property, and return thereon signed by Deputy Sheriff John Weinberg, marked Exhibit "Q", and attached hereto.

3. Copy of Notice of Circuit Court hearing, marked Exhibit "H", attached hereto.

4. Copies of inventories of property seized from each of the six Appellants herein.

5. Amended Motion for Immediate Return of Property Seized and to Quash Search Warrant of Ted's News Shop and Jack K. Rayburn.

It is further stipulated and agreed that Exhibits "F", "Q", "H", and Amended Motion aforesaid are identical, in all respects for purposes of appeal, to each of the com- [fol. 3] plaints, search warrants, returns, notices of hearing and motions filed in each of the above cases, except as to the names and addresses of the parties and the inventories applicable to each, and may be so considered by the Supreme Court of Missouri, in lieu of the original corresponding documents and pleadings in each case.

"EXHIBIT F" TO STIPULATION

COMPLAINT FOR SEARCH WARRANT

STATE OF MISSOURI)
) ss.
COUNTY OF JACKSON)

On this 10th day of October, 1957, personally appeared before me, Ben Terte, circuit judge of Jackson County, Missouri, one Charles J. Coughlin, who being duly sworn, upon his oath complains and states of his own knowledge that on the 8th day of October 1957 on the premises and in the building known, designated, and described as the Kansas City News Distributors, also known as Curtis Circulation Company, consisting of a newspaper, book and

magazine wholesale sales and store room situated on the first floor rear of a brick building and a basement, all located at 3105 Euclid, the said premises and building being in Kansas City, Jackson County, Missouri, certain persons, whose names are unknown to the said Charles J. Coughlin, have kept for the purpose of selling, publishing, exhibiting, giving away, or otherwise distributing or circulating obscene, lewd, licentious, indecent and lascivious books, pamphlets, papers, drawings, lithographs, engravings, pictures, prints and other articles or publications or an indecent, [fol. 4] immoral and scandalous character.

/s/ Charles J. Coughlin. Subscribed and sworn to before me this 10th day of October 1957.

/s/ Ben Terte, Judge.

"EXHIBIT Q" TO STIPULATION

SEARCH WARRANT AUTHORIZING SEARCH FOR PROPERTY

(Complaint under Form No. 38)

Obscene

STATE OF MISSOURI)
) ss.
COUNTY OF JACKSON)

IN THE CIRCUIT COURT OF JACKSON COUNTY

DIVISION NO. .....

THE STATE OF MISSOURI TO ANY PEACE OFFICER IN THE STATE OF MISSOURI:

WHEREAS a complaint in writing, duly verified by oath, has been filed with the undersigned Judge of this court, stating upon information and belief that heretofore the following described personal property, to-wit: obscene, lewd, licentious, indecent, and lascivious books, pamphlets, papers, drawings, lithographs, engravings, pictures, prints and other articles or publications of an indecent, immoral

and scandalous character, has been unlawfully kept and deposited, and that said property is being kept or held in this county and state at and in first floor display, retail sales, and store room, first floor rear storage room and basement; of a two story stone and concrete building located at 123 East 12th Street, Kansas City, Missouri, Jackson County, Missouri, known, designated and described as Town Book Store and,

[fol. 5] WHEREAS, the Judge of this Court from the sworn allegations of said complaint and from the supporting written affidavits filed therewith has found that there is probably cause to believe the allegations of the complaint to be true and probable cause for the issuance of a search warrant herein;

NOW THEREFORE, these are to command you that you search the said premises above described within 10 days after the issuance of this warrant by day or night, and take with you, if need be, the power of your county, and, if said above described property or any part thereof be found on said premises by you, that you seize the same and take same into your possession, making a complete and accurate inventory of the property so taken by you in the presence of the person from whose possession the same is taken, if that be possible, and giving to such person a receipt for such property, together with a copy of this warrant, or, if no person be found in possession of said property, leaving said receipt and said copy upon the premises searched, and that you thereafter return the property so taken and seized by you, together with a duly verified copy of the inventory thereof and with your return to this warrant to this court to be herein dealt with in accordance with law. Witness my hand and the seal of this court on this 10th day of October 1957.

s/ BEN TERTE
Judge of Said Court

[fol. 6] RETURN AND INVENTORY

I, John Weinberg, being a peace officer within and for the aforesaid county, to-wit: Jackson, do hereby make return to the above and within warrant as follows: that on the 10th day of October 1957, and within ten days after issuance of said warrant, I went to the location and premises described therein and searched the same for personal property described therein, and that upon said premises I discovered the following personal property described in the warrant which I then and there took into my possession (here inventory of property taken): 4,438 Sex Books, Magazines, Sets of Pics, as listed on exhibit A attached hereto and made a part hereof; that I made this inventory in the presence of the person from whose possession I took said property; that I delivered to such person a receipt for the property taken, together with a copy of this warrant; that I have now placed said property so taken in the possession of this court.

/s/ John Weinberg

Subscribed and sworn to before me this 14th day of Oct., 1957. /s/ Francis M. Cook—Clerk; James F. Moriarty, Dep. Clerk.

"EXHIBIT H" TO STIPULATION

NOTICE OF CIRCUIT COURT HEARING

TO WHOM IT MAY CONCERN:

TAKE NOTICE that on Thursday, October 17, 1957, 9:30 A.M., hearing will be had pursuant to Mo. Rev. Stat., 1949, Sec. 542.400, before the Hon. Ben Terte, circuit judge in and for Jackson County, Missouri, on the 6th floor, Jackson County Court House, 12th and Oak, Kansas City, Missouri, [fol. 7] to determine whether the following property, seized pursuant to warrant on October 10, 1957, at 123 East 12th Street, Kansas City, Missouri, constitutes obscene, lewd, licentious, indecent or lascivious material within the meaning and intent of Mo. Rev. Stat., 1949, Sec. 542.380, paragraph (2) and, as such, is subject to destruction by burning or otherwise pursuant to Mo. Rev. Stat., 1949, Sec. 542.420, to-wit:

EXHIBIT A TO NOTICE OF CIRCUIT COURT HEARING

KANSAS CITY, JACKSON COUNTY, MISSOURI

OCTOBER 10TH, 1957

By authority of Search Warrant issued by ...., Judge of Division ....., Circuit Court of Jackson County, Missouri, the following articles were seized from Town Book Shop, located at 123 East 12th Street, and receipt is hereby given.

Number			
95	Nudist Year Book	2	Mr.
21	Figurette	20	Relax
43	Fling	57	Playboy
	Sun Magazine	443	Adam
	Fads and Fancies	21	Satan
76	Sunbathing Review	51	Escapade
6	Figure Studies Annual	38	Scamp
50	Sunbathing	35	Dude (The)
	Jester	82	After Dark

[fol. 8]

18	Figure	84	Nuget (Nugget)
57	Sir	31	Caper
84	Rex	23	Life Study
19	21 Annual		
45	Gent		

Miscellaneous

77	Jem	17	Duke	11	Body Beaut.
16	Gay Blade	152	(Sets) Photos	27	Photo Arc.
20	Pose	5	Playboy Books	18	Bed Side
61	After Hours	41	Cabaret	5	Unusual Mod.
2	Rogue	29	Showplace	2	Rose Mary
59	Man (Modern)	33	Art Camera	2	Kim White
29	High Gala	6	Sexology	53	Misc. Sex Bks.
		108	Playboy (Cal.)	496	Blue Books
18	Ho	13	Mod. Sex	1699	Misc. Sex Mag.
20	Monsieur	18	Popular Man	(1699)	

Received by: Sheriff's Office

By John Weinberg
- Investigator -

4,438

/s/ Ben Terte, Judge

Dated this 11th day of October, 1957

(The following inventories are copied herein completely, but the notices to which they were attached are not set forth, in line with the stipulation heretofore set out.)

[fol. 9]

EXHIBIT A TO NOTICE OF CIRCUIT COURT HEARING

KANSAS CITY, JACKSON COUNTY, MISSOURI

OCTOBER 10, 1957

By authority of Search Warrant issued by Ben Terte, Judge of Division 9, Circuit Court of Jackson County, Missouri, the following articles were seized from Ted's News & Book Shop, located at 221 East 12th St., and receipt is hereby given.

Number			
	Nudist Year Book	6	Mr.
10	Figurette		Relax
11	Fling	20	Playboy 36 Calendars
12	Sun Magazine	98	Adam
7	Fads and Fancies		Satan
1	Sunbathing Review	25	Escapade
	Figure Studies Annual	13	Scamp
	Sunbathing	20	[illegible]de (The)
	Jester	32	After Dark
	Figure	30	Nuget (Nugget)
37	Sir	17	Caper

Number	
22	Rex
13	21 Annual
	Gent
23	Jem
11	Gay Blade
5	Pose
20	After Hours

[fol. 10]

4	Rogue
21	Man (Modern)
4	High
5	Gala
	Ho
1	Monsieur
24	Showplace
8	Facts
10	Act Medical
4	Bare
5	Harem
2	Psychology
9	Art & Camera
8	Photo Exhibits
6	Picture Annual
4	Follies
3	Glamour Parade
2	Womans Life
6	Your Personality
11	" Health
8	Real Life Guides
6	Your Life
4	Tomorrow's Men
10	Vim
11	Life Study
	Miscellaneous
5	True—Page 57
10	Photography
3	Dukes
16	Master Photography
15	Photo Arcade
11	He
26	Exotique
2	Sexology
18	Frolic
15	Prof. Photography

Received by: Robert Copeland

2 Playboy Annuals

[fol. 11]

Number	
5	Body Beautiful
8	Adonis
10	Popular Man
8	Joker
3	Jest
4	Comedy

EXHIBIT A TO CIRCUIT COURT HEARING

KANSAS CITY, JACKSON COUNTY, MISSOURI

OCTOBER 1957

By authority of Search Warrant issued by ...., Judge of Division ....., Circuit Court of Jackson County, Missouri, the following articles were seized from Title News Shop, located at 104 East 10th St., and receipt is hereby given.

Number			
	Nudist Year Book	2	Sex Control
6	Figurette	9	Playboy Calendars
	Fling	1	Are you Over Sixty
2	Sun Magazine	1	Open at Your Risque
	Fads and Fancies	22	Playboy
1	Sunbathing Review		Adam
	Figure Studies Annual		Satan
17	Sunbathing	5	Escapade
	Jester	2	Scamp
1	Figure Photo	6	Dude (The)

[fol. 12]

9	Sir	14	After Dark
9	Rex	4	Nuget (Nugget)
	21 Annual	5	Caper
5	Gent	1	Naked & Unashamed
1	Jem	1	American Aphrodite

Number	
	Gay Blade
10	Pose
	After Hours
3	Rogue
12	Man (Modern)
4	High
2	Gala
1	Its Only Natural
1	Daisy Fannie
16	Post Cards
1	Chastity Girdles
6	Exotique
1	Sex Perversion & Love
2	Jest on Sex
1	(Unintelligible)

Miscellaneous	
7	Professional Phot.
4	Man
5	Duke
1	Female Figure
2	Champ
7	Master Phot.
2	Great Phot.
2	Man Annual
3	Peep Show
4	Photo Exibt
4	Figure Quarterly
3	Males

Received by:
Sgt. L. P. Smith #3
10-10-57
1:00 p.m.

4	Good Phot.
3	Glamour Phot.
5	Creative Phot.
1	Frenchie
1	Model Magnifique
7	Dare

[fol. 13]

1	Handbook Phot.
5	Photo Annual
4	Female Phot.
1	Prizewinner Phot.
1	Phot. Studies
1	Camera in Paris
4	Art & Camera
2	Screen & Photo
2	Camera
4	Life & Study
1	Figure
3	Artists Models
10	She
5	Marriage Sex
6	Showplate
3	The Mountain Boys
4	Quick
2	Art of Love
1	Amorus Intrigue
1	Fun
1	Breezy
2	Pepper
10	Comic Jokes 25¢
12	Comic Jokes 35¢

Number	
1	Graphic Models
4	Photo
1	Photo Art
3	T N T
6	Unusual Models
4	Art Studies
3	Bare
10	People
2	Dixie Sparkle
3	Rosemary Clark
3	Quick
1	Mating Manual
1	Vue
1	Scope
2	Revealed
5	Frolic
4	Glamour Parade
6	Off Limits
1	Photo Ideas
1	Night Beat
1	Dance Hall to White Slavery
1	Aunt Sally Policy # Dream Book

[fol. 14]

s/ Sgt. L. P. Smith

s/ Ptl. Glenn Gibson

s/ Cpl. Harold O. Sharon

K. C. News 3105 Euclid

100	Showplace	25	After Dark
51	For Men Only	25	Lowdown
50	Figure Photography	25	Caper
125	Figure Quarterly	25	Models Studies
25	Photo Exhibit	50	Modern Man Annual
100	Modern Man Annual	25	21 Annual
75	Hep	25	Cabaret Quarterly
497	Playboy (Oct)	20	Figure Studies
28	Playboy (Sept)	25	Figure Quarterly
68	Professional Photog.	25	Lowdown
25	Nudist Yearbook	150	Modern Man
100	Stag	25	Sunbathing Review
50	Whisper (Dec)	13	Model Man Quarterly

150	Nite & Day	12	Model Man Quarterly
309	Photog. (Creative)	100	Adam
50	Whisper (Dec)	51	After Hours
100	Nudist Yearbook	25	Modern Man
100	Modern Man Annual	11	Sexology
50	Nugget	25	Adam
50	Real Man	50	Adam

[fol. 15]

50	Figure Studies	100	Escapade
100	Adam	50	Classic Photography
75	Gem	11	Classic Photography
50	Nugget	25	Lens
20	Life Study	6	Sunbathing Review
25	Real Men	6	Model Studies
50	Sunbathing Review	9	Figure Quarterly
74	Nugget	13	Lens
1	Caper	10	Color Annual
125	Whisper	7	21 Annual
25	Lowdown	21	Adam
7	Adam	25	Lens
21	Photo Exhibit	100	Figure
8	American Sunbather	90	Nudist Yearbook
150	Nudist Yearbook	3	Fairer Sex
3	Bronz Thrills	9	Gala
20	Modern Men's World	29	Jem
15	Modern Men	75	Whisper
12	Modern Man	8	Pictorial Annual
8	Breezy	5	After Dark
42	Sir Annual	11	Lowdown
14	Caper	5	Sunbathing for Health
12	Gay Blade	2	Adonis
2	Body Beautiful	2	On the QT
3	Amature Art & Camera	3	Harem

[fol. 16]

2	Jive	2	Smiles
3	Modern Man Annual	2	Pepper
1	Scamp	3	TV Girlie Gags
1	Paris Life	2	Inside
2	Rex	6	Cabaret Quarterly
1	Eye Opener	8	Glamour Parade
1	Photo Annual	7	Cabaret Quarterly
2	Monsieur	8	Model Studies Annual
1	Model Studies	1	Pose
1	Male Points	1	Checks & Chuckles
1	She	1	Bold
1	Quick	1	Dare
1	Brave	1	Tempo
1	Share	1	He
3	Bare	2	Ho
2	High	4	Joker
8	Nifty	7	Fotorama
3	TNT		

K. C. News

EXHIBIT A TO CIRCUIT COURT HEARING

KANSAS CITY, JACKSON COUNTY, MISSOURI

OCTOBER 1957

By authority of Search Warrant issued by Ben Terte, Judge of Division 9, Circuit Court of Jackson County, Missouri, the following articles were seized from Jack's Newsstand, located at 1 E. 39th, K. C., Mo., and receipt is hereby given.

[fol. 17]

Number			
1	Nudist Year Book		Mr.
	Figurette		Relax
	Fling	30	Playboy

Number	
7	Sun Magazine
	Fads and Fancies
25	Sunbathing Review
14	Figure Studies Annual
6	Sunbathing
	Jester
25	Figure
14	Sir
20	Rex
	21 Annual
24	Gent
4	Jem
	Bay Blade
29	Pose
2	After Hours
4	Rogue
103	Man (Modern)
7	High
4	Gala
	Ho
	Monsieur

[fol. 18]

7	Stare
13	Jest
9	Backstage Follies
7	Pic
22	Adam
	Satan
8	Escapade
8	Scamp
32	Dude (The)
35	After Dark
37	Nuget (Nugget)
40	Caper
	Life Study

Miscellaneous	
14	Photography Annual
4	Bronze Thrills
34	Cabaret
42	Master Photography
16	Pack O'Fun
14	Vue
17	Sexology
26	Nifty
21	Scope
10	Picture Digest
11	Glamour Photography
1	Female Thighs & Nudes
6	Over Sexteen

Received by:

Gerald Bean JCSP

Cpl. Ray Colman KCPD

Victor Loczec KCPD

Number			
4	X Citement	1	Spice Thats Nice
14	Comedy	2	Sexual Symbolism
21	Breezy	1	Jest on Sex
16	Gee Whiz	2	Abnormal Sex Behavior
18	Snappy	16	Photography
5	Zip	1	Lets Play Doctor
18	Gaze	1	Use your Own Couch
9	Laff Book	1	Sex Deviations
9	Wham	6	Camera In Paris
1	Foto Rama	3	Creative Pictures
6	Fun	1	Sex Life In Marriage
26	Joker	42	Misc. Photography books
17	Tab	18	Photographers' Show Place
13	Classic Photography	2	Jive
3	Tan	3	Hep
31	Professional Photography	5	Pin Ups
12	Model Studies	6	Paris Life
4	Screen Photography	18	Life Study
[fol. 19]			
5	Man to Man	1	Naked Body
1	Nus	12	Frolic
4	Sunbathing Annual	8	Nite & Day
1	Pep Show	1	Photography Handbook
1	Glamor Parade	3	Art & Camera
10	Modern Sunbathing	1	Figure Photography
13	Glamor Photos		

EXHIBIT A TO CIRCUIT COURT HEARING

KANSAS CITY, JACKSON COUNTY, MISSOURI

October 10, 1957

By authority of Search Warrant issued by Ben Terte, Judge of Division 9, Circuit Court of Jackson County, Missouri, the following articles were seized from Rubach's News Stand, located at 5 W. 12th, K.C., Mo. and receipt is hereby given.

Number			
21	Nudist Year Book	0	Mr.
0	Figurette	0	Relax
93	Fling	80	Playboy
0	Sun Magazine	475	Adam
0	Fads and Fancies	0	Satan
57	Sunbathing Review	49	Escapade
3	Figure Studies Annual	0	Scamp
46	Sunbathing	41	Dude (The)
0	Jester	66	After Dark
34	Figure	88	Nuget (Nugget)

[fol. 19a]

65	Sir	34	Caper
50	Rex	17	Life Study
0	21 Annual		
17	Gent		*Miscellaneous*
41	Jem	90	small paper back magazines 10¢
0	Gay Blade	10	envelopes—163 package photos
50	Pose	50	pkgs wallet size comic cards
39	After Hours	188	3 x 5 books 10¢ modern photography
0	Rogue	6	sun bather 36 frolic—36 photographer

Number		*Miscellaneous*
17	Man (Modern)	Show Place 50 She—12 photography handbook
26	High	
0	Gala	16 art & camera—11 peep show—3 Good Photography—9 figure photography
5	Ho	
0	Monsieur	5 Prize Winning Photography 9 mens World—6 Valor—21 Stag—2 Glamor

Parage—5 Gusts—19 Queen of Hearts 9 Carol Haze—6 Meet the Girls—104 assorted 50¢ magazines—31 Hard Back Sex Books.

Received by:

Lt. B. P. Morton -s-

J.C.S.P.

[fol. 20]

IN CIRCUIT COURT OF JACKSON COUNTY, MISSOURI

AMENDED MOTION OF TED'S NEWS SHOP AND JACK K. RAYBURN FOR IMMEDIATE RETURN OF PROPERTY SEIZED AND TO QUASH SEARCH WARRANT—Filed October 31, 1957

Ted's News Shop and Jack K. Rayburn move the Court for the immediate return of the property seized under the purported authority of a search warrant issued by Judge Ben Terte on October 10, 1957, to search the premises at 221 East 12th Street, Kansas City, Missouri. Movants also move the Court to quash the search warrant and to suppress as evidence the property seized. The grounds for this motion are as follows:

(1) Ted's News Stand is engaged in the distribution of nationally distributed periodicals and magazines at 221 East 12th Street, Kansas City, Missouri.

(2) Jack K. Rayburn is its manager.

(3) On October 10, 1957, Charles J. Coughlin filed a complaint for a search warrant in this Court which alleged in part that on the 9th day of October, 1957, in movants' premises "certain persons, whose names are unknown to the said Charles J. Coughlin, have kept for the purpose of selling, publishing, exhibiting, giving away, or otherwise distributing or circulating obscene, lewd, licentious, indecent and lascivious books, pamphlets, papers, drawings, lithographs, engravings, pictures, prints and other articles or publications of an indecent, immoral, and scandalous character."

(4) On October 10, 1957, this Court issued a search warrant directed to any peace officer in the State of Missouri [fol. 21] which recited that a complaint had been filed stating "that the following described personal property, to-wit: obscene, lewd, licentious, indecent, and lascivious books, pamphlets, papers, drawings, lithographs, engravings, pictures, prints and other articles, or publications of an indecent, immoral and scandalous character has been unlawfully kept and deposited" on the premises at 221 East 12th Street, and commanding a search of the described premises wtihin 10 days by day or night and "if said above described property or any part thereof be found on said premises by you, that you seize the same and take some into your possession."

(5) On October 10, 1957, police officers and deputy sheriffs went to the premises at 5 West 12th Street, made a determination of what property came within the description of the warrant and seized numerous periodicals, magazines and other publications.

(6) The articles seized are the property of movants.

(7) Section 542.380 and Section 542.400 R. S. Mo., 1949, and Rule 33 of the Rules of the Supreme Court of Missouri, under which sections and rule the said warrant was issued,

are unconstitutional by allowing a search warrant to be issued and the property set forth in Section 542.380 (2) seized ex parte without notice and without any hearing afforded to the owners of the property prior to such seizure, for the reason that it allows a search and seizure of books, pamphlets, and the other publications specified in Section 542.380 (2) without notice or any hearing afforded to the [fol. 22] owners of the property prior to seizure, for the purpose of determining whether or not these books, pamphlets and other publications are obscene, lewd, licentious, indecent, lascivious or of an immoral or scandalous character, and therefore constitutes a prior restraint or censorship of said publications, impairing movants' freedom of speech and publication in contravention of Article I, Section 8 of the Missouri Constitution, the freedom of speech and press clause of Amendment I of the United States Constitution. Such impairment of movants' speech and press deprived them of their privileges and immunities as citizens and their property without due process of law as guaranteed by the privileges and immunities and due process clauses of Amendment XIV of the United States Constitution. By reason of the foregoing, said search and seizure were unreasonable and constituted a violation of Article I, Section 15 of the Missouri Constitution.

(8) Section 542.380 and Section 542.400 R. S. Mo., 1949, and Rule 33 of the Rules of the Supreme Court of Missouri, under which sections and rule the instant warrant was issued, are unconstitutional as applied in this case for the reason (a) that it allowed movants' periodicals and magazines to be seized by police officers and deputy sheriffs without notice or any hearing afforded to the movants prior to seizure for the purpose of determining whether or not these books, pamphlets and other publications are obscene, lewd, licentious, indecent, lascivious, or of an immoral or [fol. 23] scandalous character, (b) that it allowed police officers and deputy sheriffs to decide and make a judicial determination after the warrant was issued as to which of movants' periodicals and magazines were "obscene, lewd, licentious, indecent and lascivious" or were of an "indecent, immoral and scandalous character" and were subject to seizure, impairing movants' freedom of speech and pub-

lication in contravention of Article I, Section 8 of the Missouri Constitution, the freedom of speech and press clause of Amendment I of the United States Constitution. Such impairment of movants' speech and press deprived them of their privileges and immunities as citizens and their property without due process of law as guaranteed by the privileges and immunities and due process clauses of Amendment XIV of the United States Constitution. By reason of the foregoing, said search and seizure were unreasonable and constituted a violation of Article I, Section 15 of the Missouri Constitution.

(9) The search warrant was improper upon its face because it is not directed to a person or persons by name, but to a class, and is not directed to any particular peace officer or officers as required by Rule 33.01 of the Rules of the Supreme Court of Missouri.

(10) The search warrant was illegally issued because the complaint for its issuance and the warrant itself did not contain a description of the personal property to be searched for and seized in sufficient detail and particularly [fol. 24] to enable the person serving the warrant to readily ascertain and identify the same and thereby violated Rule 33.01 (b) of the Rules of the Supreme Court of Missouri and further did not describe the things to be seized as nearly as may be making the search and seizure unreasonable in violation of Article I, Section 15 of the Missouri Constitution.

(11) The search warrant was illegally issued because it was issued without a finding by the Court that there was probable cause or reasonable grounds for its issuance and there was no proper showing of probable cause and therefore the search and seizure were unreasonable and constituted a violation of Article I, Section 15 of the Missouri Constitution.

(12) The property seized is not the type of property whose seizure is authorized by any statute of this State.

(13) The search warrant was illegally issued because it authorized a search and seizure of movants' magazines and publications prior to distribution and thereby consti-

tuted a prior restraint or censorship of said magazines and publications impairing movants' freedom of speech and publication in contravention of Article I, Section 8 of the Missouri Constitution, the freedom of speech and press clause of Amendment I of the United States Constitution. Such impairment of speech and press deprived movants of privileges and immunities as a citizen and property without due process of law as guaranteed by the privileges and immunities and due process clause of Amendment XIV of [fol. 25] the United States Constitution. By reason of the foregoing, said search and seizure were unreasonable and constituted a violation of Article I, Section 15 of the Missouri Constitution.

(14) The magazines and publications seized are not obscene or otherwise subject to penalty by statute and their seizure impaired movants' freedom of speech and publication in contravention of Article I, Section 8 of the Missouri Constitution, the freedom of speech and press clause of Amendment I of the United States Constitution. Such impairment of speech and press deprived movants of privileges and immunities as a citizen and property without due process of law as guaranteed by the privileges and immunities and due process clause of Amendment XIV of the United States Constitution. By reason of the foregoing, said search and seizure were unreasonable and constituted a violation of Article I, Section 15 of the Missouri Constitution.

(15) The search warrant was illegally issued because the complaint alleges insufficient facts and it is not supported by evidential facts from which a Court could determine the existence of probable cause and thereby violated Rule 33.01 (a) of the Rules of the Supreme Court of Missouri.

(16) The search warrant is void because (a) it constitutes a general warrant to search and seize; (b) it is improper and insufficient on its face; (c) the complaint for its issuance is not in the proper form prescribed by statute, [fol. 26] Rule 33 of the Supreme Court Rules and Article I, Section 15 of the Missouri Constitution, and does not contain the necessary elements needed for the issuance of a valid search warrant; (d) the complaint for its issuance

and the search warrant itself do not state facts constituting probable cause for its issuance; (e) the complaint for the issuance and the search warrant itself state mere conclusions and do not particularize any alleged violations of the law which would authorize its issuance; (f) it does not prescribe a definite time for its execution; (g) Section 542.380 R. S. Mo., 1949, is unconstitutional for the reason that it authorized a Clerk of the Court to issue a search warrant and thereby allows a search warrant to issue without a judicial finding of probable cause in contravention of Article I, Section 15 of the Missouri Constitution; (h) it was issued without proper oath and affirmation as required by Article I, Section 15 of the Constitution of the State of Missouri, as required by the Statutes of Missouri, particularly Section 542.380 R. S. Mo. 1949, and as required by Rule 33 of the Rules of the Supreme Court of Missouri; (i) it authorized a search at night time, and (j) it authorized a search within ten days after its issuance.

(17) That there was not probable causes for believing the existence of the grounds on which the warrant was issued.

(18) That the search and seizure were undertaken without probable cause.

(19) That the articles seized were not described in the [fol. 27] warrant and that the officers were not otherwise lawfully privileged to seize the same.

(20) That the warrant was improperly executed in that (a) the articles seized were not subject to seizure under any statute of Missouri, and (b) the articles seized were not subject to seizure under the freedom of speech and press clause of Article 1, Section 8 of the Missouri Constitution, the freedom of speech and press clause of Amendment I of the United States Constitution and the seizure thereby impaired movants' right of freedom of speech and press as guaranteed by these clauses. Such impairment of speech and press deprived movants of privileges and immunities as a citizen and property without due process of law as guaranteed by the privileges and immunities and due process clauses of Amendment XIV of the United

States Constitution. By reason of the foregoing, said search and seizure were unreasonable and constituted a violation of Article I, Section 15 of the Missouri Constitution.

(21) By reason of each and every ground heretofore enumerated said search and seizure and said search warrant were unreasonable and violative of movants' rights under Article I, Section 15 of the Missouri Constitution and the due process clause of Amendment XIV of the United States Constitution.

(22) By reason of each and every ground heretofore enumerated and by reason of the unreasonable search and seizure movants are compelled to testify against themselves [fol. 28] in violation of the self-incrimination clause of Article I, Section 19 of the Missouri Constitution.

[fol. 29]

IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI

Transcript of Trial—October 23, 1957

The trial began on Wednesday, October 23, 1957, before the Honorable Ben Terte, Judge of Division No. 9, of the Circuit Court of Jackson County, Missouri, at Kansas City.

The State was represented by Earl H. Schrader, Jr., and Loeb H. Granoff, its attorneys.

The defendants were represented by Morris A. Shenker, Sidney M. Glazer, Bernard J. Mellman, Louis Wagner, and Lawrence Brown, their attorneys.

The following proceedings were had:

LIST OF TITLES OF PUBLICATIONS OF STATE'S EXHIBITS

Mr. Schrader: Let the record show that the reporter has been asked to mark "Playboy Annual" as State's Exhibit Number 1. And "The Best From Playboy" as State's Exhibit 2. And "Cabaret Quarterly, Volume 6," as State's Exhibit 3. And "Modern Man, Volume 7," as Exhibit 4. And "Sir Annual, Winter 1957," as Exhibit 5. And "Photographs Showplace, November 1957," as Exhibit 6. And

"Hep, October 1957," as Exhibit 7. And "Lens"—L-e-n-s—"October 1957," as Exhibit 8.

And "Lowdown, November 1957," as Exhibit 9.

And "Gay Blade, October 1957," as Exhibit 10.

And "Scamp, November 1957," as State's Exhibit 11.

"Paris Life, December 1957," as State's Exhibit 12.

"Rex, October 1957," as Exhibit 13.

And "Eye Opener, Number 3," State's Exhibit 14.

[fol. 30] And "For Men Only," State's Exhibit 15, December.

State's Exhibit 16, "Adonis, November 1957."

State's Exhibit 17, "Tempo, November 1957."

Eighteen, "Dare, October 1957."

Nineteen, "Quick, October 1957."

Twenty, "Bold, November 1957."

Twenty-one, "Figure," State's Exhibit 21. "Autumn."

Twenty-two, "He, November 1957."

Twenty-three, "Monsieur, October 1957."

Twenty-four, "Brave, November '57."

Twenty-five, "Model Studies, Volume 9."

Twenty-six, "Adam, Volume 9."

Twenty-seven, "Stag, November '57."

Twenty-eight, "Adam, Volume 11."

Twenty-nine, "Figure—Figure Quarterly, Summer Edition."

Thirty, "21 Annual."

Thirty-one, "Photography No. 2." "Photography No. 2" is No. 31. "Creative Photography."

"Photo Exhibit," 32. "November '57."

Thirty-three, "Real Men, December."

"Playboy, September Issue," No. 34.

"Playboy, October Issue," 35.

"Fair Sex," No. 36.

"Classic Photography, Autumn Issue," 37.

"Gala"—G-a-l-a—"November Issue," No. 38.

[fol. 31] "Sunbathing For Health Magazine, October Issue," No. 39.

"Ho," is 40, "November Issue."

Forty-one, "High," H-i-g-h, "December Issue."

Forty-two, "Nugget, October Issue."

Forty-three, "Joker, December Issue."

Forty-four, "Nifty, December Issue." N-i-f-t-y.
Forty-five, "Harem, November Issue."
Forty-six is "Bare, November Issue."
Forty-seven is "Master Photography, Winter Issue."
Forty-eight, "Chicks and Chuckles, October Issue."
Forty-nine, "October Issue, She." S-h-e.
Number 50, "Breezy, December Issue." B-r-e-e-z-y.
Number 51, "Figure Studies, No. 10."
Number 52, "Amateur Art and Camera, Winter."
Number 53, "Gem"—G-e-m—"December Issue."
Number 54 is "Night and Day, October Issue."
Number 55 is "Adam, No. 11."
Number 56, "Professional Photography."
Number 57, "Modern Man Quarterly, Fall Edition."
Fifty-eight, "Special Issue, Inside, September."
Fifty-nine, "Modern Man, October Issue."
Sixty, "Sunbathing and Nudist Leader, October Issue."
Sixty-one, "After Dark, December Issue."
Sixty-two, "After Hours, Volume 1, No. 4."
Sixty-three is "Figure Photography."
[fol. 32] Sixty-four is "Modern Sunbathing, Nudist Yearbook, No. 5."
Sixty-five is "Life Study, No. 12."
Sixty-six is "Glamor Parade, December Issue."
Sixty-seven, "Fotorama." F-o-t-o-r-a-m-a—"November Issue."
Sixty-seven-a, "Bronze Thrills, October Issue."
Sixty-eight, "Picture Annual."
Sixty-nine, "Smiles, December Issue."
Seventy, "Jive"—J-i-v-e—"October Issue."
Seventy-one, "Whisper, December Issue."
Seventy-two, "Nugget, November Issue."
Seventy-three is "Pepper"—P-e-p-p-e-r—"December Issue."
Seventy-four, "Modern Man, Volume 6."
Seventy-five is "Sexology, October Issue."
Seventy-six, "Playboy, October Issue."
Seventy-seven, "Photo Ideas, No. 1."
Seventy-eight, "Photo Annual, '57."
Seventy-nine is "TV Girls and Gags"—G-a-g-s—"November Issue."

Eighty is "Pose"—P-o-s-e—"October Issue."

Eighty-one is "Male Point of View, November Issue, How to be a Beast with women."

Eighty-two, "Annual, September '58, Photographers' Annual.

[fol. 33] Eighty-two-a, "Fads and Fancies, Utopia No. 5."

Eighty-three, "Scamp, November Issue."

Eighty-four is "Gent, October Issue, 1957."

Eighty-five, "Fads and Fancies, No. 2 Utopia."

Eighty-six is "Photography Color Annual, 1957."

Eighty-seven is "Amorous Intrigue, Venial Sin," book.

Eighty-eight, "T.N.T., October 1957."

Eighty-nine, "From Dance Hall to White Slavery."

Ninety is "The Art of Love, Cyrano de Bergerac."

Ninety-one, "Chastity Girdles."

Ninety-two, "Sunbather, October 1957."

Ninety-three, "Night Beat, December '57."

Ninety-four, "Amateur Screen and Photography, Autumn."

Ninety-five, "Figure Studies Annual, No. 10."

Ninety-six, "Foto Art, Volume 4, No. 6."

Ninety-seven, "Graphic Models, No. 6."

Ninety-eight, "Artists' Models, No. 6."

Ninety-nine, "Life Study, No. 12."

One hundred is "Darling Diana."

One hundred one, "Picture Scope"—S-c-o-p-e—"November."

One hundred two, "Sunbathing For Health Magazine, October."

One hundred three, "Fling, No. 4."

One hundred and four, "Off Limits, Fall 1953."

[fol. 34] One hundred five, "Off Limits, Summer, '53."

One hundred six, "Beauty Contest."

One hundred seven, "Vue, November."

One hundred and eight, "Pose"—P-o-s-e—"November."

One hundred and nine, "Ho, The Long Magazine. November."

One hundred and ten is "Rex, Man About Town, November."

One hundred and eleven, "After Hours, Volume 1, No. 4."

One hundred and twelve, "Foto." F-o-t-o.

One hundred and thirteen, "Dude, November 1957." D-u d-e.

One hundred and fourteen, "Modern Sunbathing; October '57."

One hundred and fifteen, "Frolic, December."

One hundred and sixteen, "Caper." C-a-p-e-r. November.

One hundred and seventeen is "Monsieur." M-o-n-s-i-e-u-r. October.

One hundred and seventeen-a. That is "2d Annual." '56 and '57.

One hundred and eighteen, "Gala." G-a-l-a. November.

One hundred and nineteen, "Quick." Q-u-i-c-k. German publication.

One hundred and twenty, "Champ, November."

One hundred twenty-one, "Adam, No. 10."

One twenty-two, "Valor." V-a-l-o-r. December.

One twenty-three, "Stag, November."

[fol. 35] One twenty-four, "Bonnie."

One twenty-five, "The Facts of Rejuvenation, Little Book No. 648."

One twenty-six is "College Laughs." L-a-u-g-h-s.

One twenty-seven, "Unusual Models, No. 2."

One twenty-eight, "Postcards."

One twenty-nine is "Confidential Chats with Wives, No. 645."

One thirty, "French Cartoons and Cuties, November."

One thirty-one, "Army Fun, November, December."

One thirty-two, "Bizarre." B-i-z-a-r-r-e. "No. 20."

One thirty-three, "Exotique." E-x-o-t-i-q-u-e. "No. 6."

One thirty-four, "Gallery, Volume 3."

One hundred thirty-five, "Amateur Art and Camera, Winter."

One thirty-six, "Sir, December."

One thirty-seven, "Figure, Quarterly."

One thirty-eight, "Her Burning Secret, 817, Little Blue Book."

One thirty nine, "Zip." Z-i-p. November.

One forty, "Girly Gags, December."

One forty-one is "Broadway Laughs, November-December."

One forty-two, "Nifty," for December.

One forty-three, "Modern Glamour Gal, Series No. 1."

One forty-four, "Presenting Brandee Kayse." K-a-y-s-e.

[fol. 36] One forty-five, "Girls Beautiful, No. 25."

One forty-six, "The Third Dimension Photo, No. 1."

One forty-seven, "Chorus Girl and Lover's Wife."

One forty-eight, "Sexological Dictionary."

One forty-nine, "The Dawn of Rational Sex Ethics."

One fifty, "Sex Symbolism."

One fifty-one, "Notes on Cases of Sexual Suppression."

One fifty-two, "Your Affections, Emotions and Feelings."

One fifty-three, "Strange Loves."

One fifty-four is "Sexual Impotence, Its Causes and Treatments."

One fifty-five, "The White Slave Traffic."

One fifty-six, "Are You Sexually Attractive?"

One fifty-seven, "The Fleece of Gold."

One fifty-eight, "The Confessions of a Modern Woman."

One fifty-nine, "Her Burning Secret."

One sixty, "When Youth Burns."

One sixty-one, "Sex and Blackmail Rackets Exposed."

One sixty-two, "Four Essays on Sex."

One sixty-three, "A Night in White Chapel."

One sixty-four, "Postcards."

One sixty-five, "The Psychology of Sex Life."

One sixty-six, "Sex Impotence, its Causes and Treatment."

One sixty-seven, "Freud on Sleep and Sexual Dreams."

One sixty-eight, "The Determination of Sex."

[fol. 37] One sixty-nine, "What Every Married Man Should Know."

One seventy, "Growing into Womanhood."

One seventy-one, "What Great French Women Learned About Love."

One seventy-two, "The Girdle of Aphrodite."

One seventy-three, "The Girl with Three Husbands."

One seventy-four, "The Encyclopedia of Sex."

One seventy-five, "What Every Young Woman Should Know."

One seventy-six, "Sex and Psychoanalysis."

One seventy-seven, "The Dawn of Rational Sex Ethics."

One seventy-eight, "Prostitution in the United States."

One seventy-nine, "How to Choose a Mate Scientifically."
One eighty, "Artificial Insemination."
One eighty-one, "Twenty-six Men and a Girl."
One eighty-two, "The Dance of the Death."
One eighty-three, "A Nasty Story."
One eighty-four, "Syphilis, A Treatise for the American Public."
One eighty-five, "Common Sense of Sex."
One eighty-six, "Follies of Lovers."
One eighty-seven, "Dixie Sparkle."
One eighty-eight, "Queen of Hearts."
One eighty-nine, "Exotique, No. 16."
One ninety, "Strip Tease Stories."
One ninety-one, "The Bizarre, No. 20."
[fol. 38] One ninety-two, "Meet the Girls, Volume I, Issue 7."
One ninety-three, "Brandee Kayse."
One ninety-four, "Nudist Yearbook, No. 5."
One ninety-five, "Photograph Handbook, No. 327."
One ninety-six, "Laurie." L-a-u-r-i-e.
Number one-ninety-seven, "Exotique Photo Album, No. 4."
One ninety-eight, "Bizarre Party."
One ninety-nine, "Unusual Models, No. 3."
Two hundred, "Cynthia."
Two-0-one, "B-u-x-i-e—No. 6."
Carol Haze, Number 202.
Number 203, "Strange Lust."
Two-0-four, "Extatique," E-x-t-a-t-i-q-u-e.
Two hundred and five, "Sweet Sue."
Two hundred six, "Pinups of Jane Mansfield, 1957 Issue."
Two hundred seven is "Continental, Issue No. 2."
Two hundred and eight, "Art Studies, No. 1."
Two hundred nine, "How to take Glamour Photos, No. 285."
Two hundred ten, "Photo Studies, No. 350."
Two hundred eleven, "Cynthia."
Two hundred twelve, "Extatique," 212.
Two hundred thirteen, "Extatique, No. 2."
Exhibit 213 is Number 2.
Two hundred fourteen, "Extatique Photo Album, No. 3."

Two hundred fifteen, "Salon Photography, 306."
[fol. 39]. Two hundred sixteen, "Jem, December."
Two hundred seventeen, "Peter Basch's Glamour Photography, No. 313."
Two hundred eighteen, "Modern Man Quarterly, Fall Edition."
Two hundred nineteen, "Sir, Annual, Winter, 1957."
Two hundred twenty, "Male, November Issue."
Two hundred twenty-one, "Man's World, December."
Two hundred twenty-two, "Playboy, Playmate Calendar, 1958 Edition."
Two hundred twenty-three, "Escapade, December."
Two hundred twenty-four, photographs.
Two hundred twenty-five, "Exotique, No. 13."
Two hundred twenty-six, "Photographing the Female Figure, No. 348."
Two hundred twenty-seven, "Prizewinning Photography, 340."
Two hundred twenty-eight, "Figure Photography, No. 250, Peter Gowland's."
Two hundred twenty-nine, "Trained in Leather."
Two hundred thirty, "Exotique, No. 12."
Two hundred thirty-one is "Creative Photography."
Two hundred thirty-two, "Adrian Presents Nauncy Pierre."
Two hundred thirty-three, "Good Photography, 346."
Two hundred thirty-four, "Adam," that is No. 11.
[fol. 40] Two hundred thirty-five, "She, November."
Two hundred thirty-six, "Exotique, No. 7."
Two hundred thirty-seven, "Exotique, No. 10."
Two hundred thirty-eight, "Adrian Presents Nauncy Pierre."
Two hundred thirty-nine, "Frenchie."
Two hundred forty, "Art Deluxe, Series No. 2, Presenting Rosemary Clark, Series No. 2."
Two hundred forty-one, "Figure Quarterly, Volume 13."
Two hundred forty-two, "Pepper, December Issue."
Two hundred forty-three, "Modern Glamour Girls, Series No. 1."
Two hundred forty-four, "Sunbathing Review for Fall of '57."

Two hundred forty-five, "Revealed, December."
Two hundred forty-six, "Peep Show, November."
Two hundred forty-seven, "Camera in Paris, No. 343."
Two hundred forty-eight, "Pack O' Fun, December."
Two hundred forty-nine, "Glamour Parade, December."
Two hundred fifty, "Figurette, No. 4."
Two hundred fifty-one, "Breezy, December."
Two hundred fifty-two, "The Mountain Boys, No. 1441."
Two hundred fifty-three, "Quick, October."
Two hundred fifty-four, "R-o-g-u-e," Rogue. October.
Two hundred fifty-five, "Figure Quarterly."
[fol. 41] Two hundred fifty-six, "People Today, November."
Two hundred fifty-seven—these are books—two hundred fifty-seven, "Are you over Sexty?"
Two hundred fifty-eight, "What you Should Know about Sexual Impotency."
Two hundred fifty-nine, "Variations in Sexual Behavior."
Two hundred sixty, "Sex Life in Marriage."
Two hundred sixty-one, "Adam and Eve."
Two hundred sixty-two, "Sex Control."
Two hundred sixty-three, "Sexual Symbolism."
Two hundred sixty-four, "How to Achieve Sex Happiness in Marriage."
Two hundred sixty-five, "The Homosexuals."
Two hundred sixty-six, "Psychotathia Sexualis."
Two hundred sixty-seven, "The Sex Technique in Marriage."
Two hundred sixty-eight, "Female Homosexuality."
Two hundred sixty-nine, "Abnormal Sexual Behavior."
Two hundred seventy, "The Sexually Adequate Female."
Two hundred seventy-one, "The Sexpert's Travel Guide." S-e-x-p-e-r-t-s.
Two hundred seventy-two, "Homosexuality, Donald Webster Cory."
Two hundred seventy-three, "Sexual Deviations, by Louis London, M.D."
Two hundred seventy-four, "Sex Practice in Later Years." Dr. Podolski.
[fol. 42] Two hundred seventy-five, "Mating Manuals."

Two hundred seventy-six, "Marriage, Sex and Family Problems." No. 21.

Two hundred seventy-seven, pocket cards. Comic cards.

[fol. 43] The Court: The first thing, I think you ought to give the appearances to the court reporter. She says she hasn't them all.

APPEARANCES

Mr. Granoff: Let the record show that Mr. Earl Schrader, first assistant prosecuting attorney, and Loeb H. Granoff, assistant prosecuting attorney, appear in this matter on behalf of the State.

Mr. Shenker: Morris A. Shenker, Sidney M. Glazer and Bernard J. Mellman, of St. Louis, for all of the parties involved, and Mr. Louis Wagner for the Ruback & Town Book Stores.

Mr. Brown: Lawrence Brown. I represent H. M. H. Publishing Company, Inc.

Mr. Shenker: At this time, if it please the court, I would like to ask leave to file motions of the Kansas City News Distributors and Homer Smay, who is identified as the manager of that business, to quash the search warrant and for the return of property seized, as well as a supplemental motion of the same company, and I should like to ask leave to file similar motions at this time in behalf of 123 East Twelfth Street and 5 West Twelfth Street, all in Kansas City, Missouri, with leave to file the same types of motions for all of the other parties involved. We did not get the mechanics of preparing all of them, did not have all of the information. They will be of the same [fol. 44] nature. We will ask at this time that—at the conclusion we may have some minor amendment, so far as these motions are concerned, and will ask leave of court now that when we file the other motions, which will be done in a day or two, that we should have leave to amend to conform to whatever we think is appropriate.

The Court: Well, at this time the court will reserve its ruling on those motions.

Motion of H. M. H. Publishing Company, Inc. for a Separate Trial and Overruling Thereof

Mr. Brown: If the court please, on behalf of the H. M. H. Publishing Company, Inc., publishers of the magazine, "Playboy," I move for a separate trial, for a severance from this dragnet of their magazines. Of course, we can't control where the magazine is sold, and we think there is an element of perhaps—perhaps an element of guilt about association, and we feel that in the interests of justice we should be granted a separate hearing.

Mr. Granoff: May it please the court, the State would object to this motion on the ground, first of all, that severance is entirely within the discretion of the court, all of this material is before the court, and will be before the court for its determination, and I don't think that severance would in any way aid the court in determining the issues of the case as regards the publication which Mr. Brown is referring to.

The Court: All right. Motion will be overruled.

[fol. 45] Mr. Shenker: In order to expedite the handling of this matter, if the court please, representing all of the parties, it is agreeable to us that they may be tried jointly, with the understanding that if any particular matter comes up insofar as it relates to a particular individual or a particular location, that it will so be treated. It will greatly expedite the handling of the matter insofar as the court is concerned, and the State.

The Court: That is agreeable.

Opening Statement on Behalf of State

Mr. Granoff: May it please the court: The State feels that any statement to be made to the court at this time should be of the very briefest nature, particularly in view of the fact that the State has supplied the court with a trial brief as to the facts and the law in this case, and copies of that trial brief have been supplied to counsel for all of the interests appearing in this case.

Very briefly, this is a hearing called at the court's own direction, pursuant to Section 542.400 of the Missouri stat-

utes. The evidence will show that on October 10 of this year, a Jackson County law enforcement agency confiscated large quantities of books, magazines, and other publications from six locations here in Kansas City, Missouri. Now, it is the position of the State that these publications are obscene, and I might say to the court at this time that the only issue before Your Honor will be whether or not [fol. 46] the publications are in fact and in law obscene.

Now, I think that it would be proper at this time for the State to make this further remark: The Prosecutor's office would be the very last to suggest, Your Honor, that any individual or group of individuals should be set up, so to speak, as an arbitrary board of censorship. Now, it is our feeling in the matter that we live in an era of intellectual emancipation, where every individual, Your Honor, should be able to judge for himself the literary merit, if any, of any particular publication, but it is our position in this case that out and out filth and smut and dirt are not within the realm whatsoever of free speech or free press, and we feel that the evidence will show that a substantial quantity, if not all, of the material which will be introduced into evidence, is designed for the very purpose of appealing to the sensual appetite. We feel that after the court has an opportunity to examine the exhibits which will be introduced into evidence, to observe their obvious purpose and effect upon this community, that an appropriate order will be issued by the court, preventing the further circulation of this kind of moral garbage from the public newsstands.

Thank you.

Opening Statement on Behalf of Defendants

Mr. Shenker: May it please the court, the position of the parties involved here may be briefly summarized, and I [fol. 47] am not going to undertake to give all the reasons that we have at this time, but briefly may be summarized as follows: That this proceeding is improper; that the statute, by virtue of which apparently the State has proceeded, in fact, is unconstitutional; that it is vague, indefinite and uncertain; that the methods applied were arbi-

trary; and that the seizure of so vast an amount of material on the mere idea or opinion of some one or more police officers in determining that the matter is of the nature that should not be circulated in the City of Kansas City, Missouri, that that was improper; that it amounts to a censorship; that the action was totally violative of the substantive rights and of the violation of the constitutional rights of the State, as well as the Constitution of the United States, and furthermore, that the articles which are—which were seized and which are the object of this inquiry by the court now, that they are not obscene, that they are all within the arm and within the established means of communication of ideas and photographs, and that it is purely an arbitrary exercise of power by the State in having seized these materials, and of course we are asking for the return of the articles.

I might add, Your Honor, if I may, that when I said we are asking for the return of the articles, I mean that we are asking for their immediate return, because, as the court will see, many—most of them are current issues, and [fol. 48] the news value, of course, disappears after some period of time after the publication, and of course, they become entirely and completely worthless unless they are available for distribution at the immediate time, and for that reason, when we ask for return, we are asking for the immediate return so that they can be—so that it will not be a total loss to the publishers as well as to the various news venders or to the distributors.

STATE'S EVIDENCE

LT. CHARLES COUGHLIN, being sworn, testified as follows:

Direct examination.

By Mr. Granoff:

Q. Lt. Coughlin, for the record, state your full name?
A. Charles Coughlin.
Q. Where do you live?
A. 8401 Douglas, Kansas City, Missouri.

Q. What is your occupation?

A. Police officer, with the Kansas City, Missouri, Police Department.

Q. Are you assigned to any particular branch?

A. Yes, sir; vice squad.

Q. How long have you been with the Kansas City Police Department?

A. Nine and a half years.

Q. How long, Officer, with the vice squad?

[fol. 49] A. Six years.

(State's Exhibits A, B, C, D, E, and F, marked for identification.)

By Mr. Granoff:

Q. Lt. Coughlin, I hand you six documents which are marked State's Exhibits A through F. Please examine them, and tell the court what these documents are, if you know, sir.

A. These are copies of the complaints that I signed in front of Judge Terte, the 10th of October, against the locations listed—do you want me to read the locations off?

The Court: They speak for themselves.

A. Those are the complaints that I signed on October 10.

By Mr. Granoff:

Q. These are the complaints pursuant to which the six search warrants were issued, and on which this proceeding today is based, is that right?

A. Yes, sir.

OFFERS IN EVIDENCE

Mr. Granoff: At this time, Your Honor, the State would like to introduce into evidence State's Exhibits A through F inclusive.

Mr. Shenker: We are objecting to the introduction of any and all evidence on the ground that this proceeding is contrary to law and that the proceeding was in violation of

the rights of individuals involved, and we are asking for the return of the property without any necessity for a hearing.

The Court: All right.

[fol. 50] Be overruled; the objection is overruled.

Mr. Brown: We understood that the objections made by Mr. Shenker will also go to the client that I represent.

The Court: Same ruling.

(State's Exhibits A, B, C, D, E, and F, being so offered, were received in evidence.)

By Mr. Granoff:

Q. Lieutenant, please tell the court how you came to make these complaints?

A. I had conducted an investigation to complaints I had received in regard to obscene literature on newsstands—

Mr. Shenker: I am going to object to anything that was said. If he conducted an investigation, it is one thing. We object to him saying what the complaints are; that is hearsay.

The Court: Sustained.

By Mr. Granoff:

Q. You say, Officer, that you conducted an investigation, is that right?

A. Yes, sir.

Q. Please tell the court the nature of that investigation?

A. Well, the investigation started some months back by routine checks of these particular newsstands, and at which time, upon entering, we would observe these particular magazines on display at the newsstands. On October 9, the day before I signed the complaint, I went to the five newsstands involved, I observed on display at these news-

[fol. 51] stands magazines that we had observed there before. I looked at a few of these magazines, and I purchased one magazine at each newsstand. They had pictures of nude women in them; they had articles in these magazines that we felt were—

Mr. Shenker: I will object to that, as to what he felt.

The Court: That is a matter that the court will have to decide.

By Mr. Granoff:

Q. Just tell us what you did?

A. In regards to five newsstands, in regard to the distributor, 3105 Euclid, Kansas City News Distributors, on the 8th of October, two days before the complaints were signed, I went to that location and had an interview with Mr. Homer Smay—S-m-a-y—the manager, and at that time I had a list of the magazines—partial list of the magazines that we were investigating, and he admitted they were a distributor of all but one. He wasn't sure about one of these. This is in the course of a conversation that took place at that location. From that, we got the—I signed the complaints from that information I had there.

Q. Were these various magazines you have testified to among the material which was confiscated on the 10th of October, pursuant to these warrants?

A. Yes.

Mr. Granoff: I see. No further questions.

[fol. 52] Cross examination.

By Mr. Shenker:

Q. Now, Lieutenant, I have a few questions, if you please, that I would like to ask you.

A. Yes, sir.

Q. I believe you testified that prior to the time that you executed the affidavits that are identified as Exhibits A to E inclusive, that you had gone to these newsstands, is that correct, in question?

A. Yes, sir.

Q. And that you purchased some magazines?

A. Yes, sir.

Q. Now, those magazines that you purchased, do you have the names of those magazines now, do you know what they are?

A. Yes, sir; I have.

Q. What were they?

A. Well, I have the magazines right here.

Q. You have the magazines there. May I look at them, please?

A. Yes.

Q. Now, Lieutenant, you have shown me five magazines, three entitled "Adam," and then another one—the three entitled "Adam," has an inscription on the page "the most talked-about magazine in the United States," and another one entitled "Adam," and it says, "enticing, exciting enjoyment," and then another magazine, "Modern Man, Quarterly." Those are the five magazines which you purchased, is that correct, sir?

A. That is correct.

[fol. 53] Q. The first three are identical, is that correct?

A. Right.

Q. And then the other two are different?

A. Yes, sir.

Mr. Granoff: Pardon me for a moment. If you would like, the State would be more than willing to stipulate these magazines into evidence, if you think it is admissible.

Mr. Shenker: I just want to ask the Lieutenant a few more questions.

By Mr. Shenker:

Q. After you purchased those magazines you say that you also had a conversation, you went to the Kansas City Distributing Company, and had a conversation with Mr. Homer Smay, is that correct?

A. That took place the day before I bought the magazines.

Q. That was the day before you bought the magazines?

A. The 8th of October.

Q. Then you went to apply for this search warrant, is that correct?

A. Yes, sir.

Q. Now, in applying for the search warrant, did you, sir,

display any of the magazines to the Judge when you asked for the search warrant?

A. No, sir; I did not.

Q. In other words, you didn't display any of the magazines that you purchased in any of the newsstands to Judge Terte, is that correct?

A. That is correct.

[fol. 54] Q. In the preparation of the affidavits—if you would care to look at them—you did not mention any particular magazine, is that correct, any particular magazine, you just described—you just mentioned generally, using the word magazine, is that correct?

A. Well, we mentioned—we described the articles as "obscene, lewd, indecent"—is that what you are referring to?—didn't mention any magazine.

Q. Didn't mention any magazine by name or any other publication by name, is that correct, sir?

A. That is right.

Q. At the time that you purchased these magazines I will ask you, sir, if you had occasion to observe that in these establishments there were thousands and thousands of different copies of magazines, of different magazines than those which you purchased?

A. Yes, sir.

Q. Would you say it would be a fair statement that in the newsstands apart from the Kansas City News Distributing Company, that they would have approximately 25 to 30 thousand individual copies?

A. Are you referring to all magazines, or just magazines of the type we seized?

Q. No; all magazines, their entire stock.

A. I would imagine in that vicinity.

Q. You would say that would be a fair statement?

[fol. 55] A. Yes.

Q. Of course, the Kansas City News Distributing Company, they have hundreds of thousands of magazines, isn't that correct?

A. Yes, sir.

Q. That is a storage house and a distributing center?

A. Yes, sir.

Q. One or two other questions, if you please. When you went in and made out the affidavit for the search warrant, none of the parties from whom these matters were taken were present or advised ahead of time that there would be such a complaint made by you; is that correct?

A. No, sir.

Q. In other words, the only ones that were present were yourself and Judge Terte, is that correct?

The Court: And the prosecutor.

By Mr. Shenker:

Q. And the assistant prosecutor?

A. Yes, sir.

Q. Those were the only parties present, is that correct?

A. Yes, sir.

Q. And there was no notice of any kind given to either of the parties that an attempt would be made to go in and take a large portion of their stock in trade, is that correct?

A. No written notice, you mean?

Q. Well, any kind of a notice?

A. Well, in the conversation I had with Mr. Smay two [fol. 56] days prior to this seizure, we—I asked him what his opinion would be in regards to us coming out there on this matter, and he said if it was a violation of the State law, he would cease to distribute this material, but if it was a City ordinance, he felt they were unconstitutional, and he would fight it. I was trying to feel out what his position was, if I had to come out and arrest him, or what the situation would be; that is the only notice—

Q. You did not tell him or anyone else that you were going to apply for a search warrant to come and confiscate certain portions of their stock? Is that correct?

A. No, sir.

Q. All you are relating is a conversation you had with Mr. Smay as to what his position would be?

A. That is correct.

Q. He told you that if he was violating the State law, he didn't want to violate it? Is that correct?

A. That is right; yes, sir.

Q. Now, in this—there was no court reporter, of course, present at the time the search warrant was issued on your complaint?

A. Well, there was a clerk of the court, I believe.

Q. Well, was there someone taking down—writing down the conversation that you had or what took place at that time?

A. No, sir; I believe there was not.

[fol. 57] Q. I see. In other words, it is fair to say that the only ones present were yourself, the assistant prosecutor, and the judge, is that correct? No evidence was offered at the time, the only thing that you presented was your affidavit?

A. That is right.

Q. On the basis of that affidavit, you procured the search warrant?

A. That is right.

Mr. Shenker: I believe that is all.

Mr. Granoff: Thank you, Lieutenant. That is all.

(Witness excused.)

Mr. Granoff: May it please the court, on the strength of the complaints which this witness signed before Your Honor, certain notices of hearing were signed by the court, and attached to these notices was an inventory of the material taken from each location. I wonder if counsel would be in a position at this time to stipulate that these are copies of the notices issued by the court and duly posted, in accordance with law, on each of the premises, and that the inventories attached to each of these notices are full and complete and accurate inventories of all material taken from each of the locations.

Mr. Shenker: There are certain portions of this statement that I will be glad to stipulate, but I will not stipulate that everything was done according to law, because we contend it was done contrary to law.

[fol. 58] Mr. Granoff: I understand that this objection goes to the whole proceeding.

Mr. Shenker: That is correct, sir.

I will say that probably before this is done, Your Honor, that we will stipulate certainly that the inventories that were furnished by the police officers are the material that was taken, and we are not claiming that more was taken than is represented on the inventory, and we are assuming that they did not say they took something that they didn't take. We would like to hear from at least one person that went into the place and took the material.

Mr. Granoff: Fine.

Mr. Shenker: If you will put one on. It will not be necessary to put them all on, because I understand there were a number used.

STIPULATION OF COUNSEL RE OFFERS OF STATE'S EXHIBITS IN EVIDENCE

Mr. Granoff: Mr. Shenker, is it all right with you and the other gentlemen here at the table if we stipulate into evidence these six notices of hearing with the attached inventories?

Mr. Shenker: The record may show that the six notices of hearing were issued to the six individual locations that were involved, and that in each notice—to each notice was attached an inventory list representing the articles that were taken from those individual locations.

Mr. Granoff: And that the inventories are accurate?

[fol. 59] Mr. Shenker: That is correct.

(State's Exhibits G, H, I, J, K, and L, marked for identification.)

Mr. Granoff: Pursuant to stipulation with counsel, the State would like to introduce into evidence State's Exhibits G, H, I, J, K, and L, being the notice of hearing, and the attached inventories from each of the six locations.

The Court: Very well.

(State's Exhibits G, H, I, J, K, L, being so offered, were received in evidence.)

LT. BILLY C. MORTON, being sworn, testified as follows:

Direct examination.

By Mr. Granoff:

Q. Lt. Morton, for the record please state your full name?
A. Lt. Billy C. Morton.
Q. Where do you live?
A. 708 North Pearl, Independence.
Q. What is your occupation, Lieutenant?
A. Police officer.
Q. With what branch?
A. Jackson County Sheriff's Patrol.
Q. How long have you been with the Sheriff's Patrol?
A. Three years.
Q. Were you so engaged on October 10 this year?
[fol. 60] A. Yes, sir.

Mr. Granoff: Mark this State's Exhibit M.

(State's Exhibit M, marked for identification.)

By Mr. Granoff:

Q. Now, Lt. Morton, I hand you what has been marked as State's Exhibit M, and ask you to please examine it carefully and tell the court, if you know, what that is?

A. That is a carbon copy of the search warrant that I served on Ruback Newsstand on Twelfth Street.

Q. I beg your pardon, sir, isn't that the original? Look at it again. I mean, it is the original return made to this court, is that right?

A. That is the original return, yes, sir, I made to this court.

Q. All right. Tell the court, Officer, how you came to execute that warrant?

A. I was called to the Kansas City Police Headquarters to accompany two Kansas City police officers to this location to serve a search warrant.

Q. Is that your answer, sir?

A. Yes, sir.

Q. And the warrant was executed, is that correct?
A. Yes, sir.
Q. And property confiscated pursuant to it?
A. Yes, sir.
Q. This is referring to the—referring to the rear side of it, is this your signature on the return?
A. It is.

[fol. 61] Mr. Granoff: All right. Thank you.
Would you like to see this (indicating)?
Mr. Shenker: Yes. O. K.

OFFER IN EVIDENCE

Mr. Granoff: At this time, Your Honor, the State would like to introduce State's Exhibit M into evidence.
The Court: Very well.
Mr. Shenker: I suppose the record may show that that is the search warrant that was issued pursuant to—the statement or the complaint for a search warrant that was made by Officer Charles—Lt. Charles J. Coughlin, is that correct?
Mr. Granoff: That is correct.
Mr. Shenker: In order that we don't have to continue to object, I am not objecting to this particular—my objection is a general objection, going to all the inspections. I presume if it can be shown it is preserved, it won't be necessary—
The Court: That will be the understanding.
Mr. Granoff: Thank you, Officer.

(State's Exhibit M, being so offered, was received in evidence.)

Cross examination.

By Mr. Shenker:

Q. If I understand correctly, you were called upon by some members of the Police Department of Kansas City to accompany them to 5 West Twelfth Street, Kansas City, Missouri, to execute this search warrant?
A. That is correct.

[fol. 62] Q. That is State's Exhibit M?

A. Yes, sir.

Q. Now, how many persons accompanied you to that location?

A. Myself and two other police officers.

Q. You and two other officers?

A. Yes.

Q. About what time of the day did you get there?

A. 11:15.

Q. 11:15 a.m.?

A. Yes, sir.

Q. How long did you stay there?

A. I would say somewhere around 12:45.

Q. Were you there during the entire time—and I believe that the receipt for the merchandise that was taken bears your name, so you were there during the entire period?

A. That is right.

Q. Until—from the time the officers got there were you there until you took the merchandise with you away from there, is that correct?

A. That is correct.

Q. You would say approximately an hour and a half or two hours?

A. Yes, sir; something like that.

Q. Now, will you describe those premises, if you please, for the court?

A. It is a building about 20 by 20. It is located on Twelfth, with magazines displayed out in front and magazines displayed inside on the shelves. Customers in the place were buying magazines at the time that we entered.

Q. In other words, it is a place full of magazines, plus [fol. 63] other commodities, is that correct, such as candy, cigars—

A. That is correct.

Q. The articles that are ordinarily sold in a place where they sell magazines?

A. Yes, sir.

Q. It is in a corner—

A. That is correct.

Q. Now, just tell—did you yourself pick out any magazines that are attached on the list to some—I notice a list

which is attached to the return—I show you State's Exhibit "G," which appears to bear your signature—

A. Yes, sir.

Q. —Lt. Morton?

A. Yes.

Q. It has considerable writing on this, and particularly —now, in that list, did you participate yourself in selecting some of those articles that are on this list, State's Exhibit "G"?

A. I did.

Q. You did?

A. Yes, sir.

Q. And who else selected the articles?

A. The other two police officers with me; I don't recall their names.

Q. In other words, all three of you worked in selecting articles, is that correct?

A. That is right.

Q. You took what you wanted to take, and each of the other officers took what they wanted to take, is that correct?

A. I was in charge of the team there.

[fol. 64] Q. I see.

A. And everything that they confiscated they brought to me, and asked for an o.k. on it, or to leave it. I either o.k.'d it or rejected it.

Q. In other words—I am sorry, I didn't know that was the procedure followed. See if I got this right: You were in charge of the two officers that came there with you, is that correct?

A. That is right.

Q. They went about the store, is that right—

A. That is correct.

Q. —as well as you did, picking out certain magazines and publications, is that right?

A. Yes, sir.

Q. Then when they picked them out, you made the decision whether they should be taken or whether they should be left, is that correct?

A. In the presence of the manager.

Q. We are not accusing you of taking anything that isn't on the inventory. That has been stipulated, there is no

question on that at all. The only thing is that the decision —the manager had no right in determining what you should take or shouldn't?

A. That is correct.

Q. The decision was made by you?

A. That is correct.

Q. When the officer would bring over the publication, you would examine it and either—agree with the officer that it should be taken, and if it was taken, it was included on [fol. 65] Exhibit G; if it wasn't taken, it was put back on the shelf?

A. Correct.

Q. Of course you always did that yourself, I mean, you always selected articles?

A. Right, sir.

Q. And would you say that a fair statement would be that approximately there were 25 thousand magazines over at the place, at that location?

A. You mean the overall?

Q. All the magazines?

A. I imagine.

Q. Probably more than that?

A. Yes.

Q. It is a pretty big place, and they have many, many thousands and thousands of magazines, is that correct?

A. That is right.

Q. And when you took—when you decided that a magazine or a publication should be taken, you took all of that issue that was there, is that correct?

A. Yes, sir.

Q. And I notice that there is considerable handwriting on there, is that also—on the bottom part under "miscellaneous"—is that also your handwriting?

A. It is, sir.

Q. I see. In any of those instances you—in other words, the numbers that indicate there, that is the number of copies, like it says "90," that would be 90 copies, is that right?

A. That is right.

Q. And "50," that means 50 packages, and so forth?

[fol. 66] A. That is right.

Q. What did you do with those magazines when you took them, you brought them to the Prosecuting Attorney's office?
A. I brought them to the County Jail; yes, sir.
Q. Excuse me. County Jail, for safety?
A. Right.

Mr. Shenker: I believe that is all.
Mr. Granoff: Thank you, Officer.

(Witness excused.)

Mr. Shenker: We will be perfectly willing to stipulate, if the court please, that the same procedure—if that is a fact, that the same procedure was followed in the other locations that are involved in here, excepting that in some locations there were as many as 8 or 9 men involved—as I said, we would be willing to stipulate to the same procedure involved in all the other locations that are the subject of the inquiry here, and that if the State offered witnesses they would testify substantially in the same manner, excepting I do think there were some differentiations on distributors at 3105 Euclid. I asked the State to produce that witness, Your Honor.

[fol. 67] ALBERT ANGOTTI, being sworn, testified as follows:

Direct examination.

By Mr. Granoff:

Q. Officer, for the record, please state your full name?
A. Albert Angotti.
Q. Where do you live?
A. 2016 Denver, Kansas City.
Q. And although your occupation is obvious, for the sake of the record, please state it?
A. Jackson County Sheriff's Patrol.
Q. How long have you been with them?
A. About four years.
Q. Were you so engaged on October 10 of this year, Officer?
A. Yes, sir.

(State's Exhibit N, marked for identification.)

By Mr. Granoff:

Q. I hand you what has been marked as State's Exhibit N for identification. Please examine this document, Officer, and tell the court, if you know, what it is.

A. It is a search warrant authorizing the search of a property.

Q. Did you execute that warrant?

A. I did, sir.

Q. Please turn it on its reverse side, and observe the return on that warrant. Is that your signature on the return?

A. It is.

[fol. 68] OFFER IN EVIDENCE

Mr. Granoff: At this time the State wishes to introduce State's Exhibit N into evidence.

The Court: All right.

(State's Exhibit N, being so offered, was received in evidence.)

By Mr. Granoff:

Q. Now, Officer Angotti, can you tell us what time of the day was it on October 10 that this warrant was executed?

A. It was 11:15 a.m.

Q. And were you accompanied by any other law enforcement officers?

A. I was, sir; Major Dennison, of the Kansas City Police Department, and Lt. Coughlin.

Q. Also of the Kansas City Police Department?

A. Yes, sir.

Q. Please, for the benefit of the court, describe the premises, generally, that you searched?

A. Well, it was what is called the Kansas City News. It is a warehouse at Thirty-first and Euclid. It is a warehouse where they distribute magazines for all the distributors in Greater Kansas City.

Q. Did you observe large quantities of magazines and the like on the premises?

A. Yes; the warehouse, I would say, was pretty well full of magazines.

Q. I take it you executed this warrant by confiscating [fol. 69] large quantities of that material?

A. That is right.

Mr. Granoff: I have no further questions.

Cross examination.

By Mr. Shenker:

Q. I believe you testified that you went there with Lt. Coughlin and Major Dennison?

A. That is right.

Q. Did anyone else go there, besides the three of you?

A. There was another Kansas City officer with us, but I can't recall his name.

Q. Without giving the name, how many were there all together of you?

A. Four of us.

Q. Four of you?

A. Yes, sir.

Q. You went there approximately at 11:15 a.m. on the date in question, the 10th day of October, is that correct?

A. Yes, sir.

Q. About how long did you stay there?

A. I believe we left there approximately 2:15.

Q. I see.

A. As near as I can remember.

Q. Stayed approximately three hours or so?

A. Yes, sir.

Q. During that period, what did you do there?

A. Well, we had a list of what magazines that we were supposed to pick up, and anything else that we thought— [fol. 70] wasn't on the list that we—

Q. That you wanted to pick up, in your judgment?

A. In our judgment.

Q. Now, in arriving, then, at this—as to what to pick up,

did you go through all the entire premises there, or as much of it as you could see?

A. Well, as much as we could see.

Q. I see. Was there—it is a rather large building, isn't that correct?

A. Yes, sir; it is a fairly large building.

Q. Does it have more than one floor, do you recall?

A. No; just the one floor is all we looked at.

Q. There are large stacks of magazines, many of them bundled up, and they run into hundreds of thousands of copies, isn't that right?

A. Oh, yes.

Q. Probably closer to a million copies, is that right?

A. That might be true.

Q. And now when you saw a magazine that you thought you should pick up, what did you do, just turn it over and put it on the bundle on the side—take the bundle and include that on your receipt, is that correct?

A. Yes, sir.

Q. Did the other officers that were with you do the same?

A. That is right.

[fol. 71] Q. In other words, what it is, each officer—did you divide up the sections of the building into different areas, is that the idea—

A. Yes.

Q. —to some extent?

A. Yes, sir.

Q. When you looked at a bundle, you looked at a magazine, and thought it ought to be picked up, you would just take this bundle or any number of bundles of the same magazine and put it aside and put it on the receipt?

A. Yes.

Q. The same procedure was followed by the other officers that were there?

A. Yes, sir.

Q. When it was all assembled, a receipt was given to Mr. Homer Smay, is that correct?

A. Yes, sir.

Q. He is the one that is in charge of the premises, you met him there?

A. That is right.

Q. It was then hauled away in a truck, I presume?

A. It was hauled away in a truck and put on the 15th floor of the courthouse.

Q. Of the courthouse here?

A. Yes, sir.

Mr. Shenker: That is all.

(Witness excused.)

Mr. Granoff: May it please the court, it is the intention of the State to call four other officers of the local law enforcement agencies, who would testify as to the respec- [fol. 72] tive location which they went to as to the execution of the other four search warrants in this case. I should like to ask counsel at this time whether they would be in a position to stipulate that these officers would testify to substantially the same things and identify these exhibits in the same way the two previous officers have done, but as to the remaining four locations involved in this case.

Mr. Shenker: I thought I had already stipulated to that, but if I haven't, I will.

OFFERS IN EVIDENCE

Mr. Granoff: In that case, I would like to have these four search warrants marked as exhibits in the case, and should like at this time to introduce them into evidence.

(State's Exhibits O, P, Q, and R, marked for identification.)

(State's Exhibits O, P, Q, and R, being so offered, were received in evidence.)

Mr. Granoff: Your Honor, if the record is not already clear on this point, I should like it to be understood, if counsel are in a position to so stipulate, that all of the material reflected on the inventories attached to the notices of hearing in this case already introduced into evidence reflect all of the material confiscated by the law enforcement agencies, pursuant to the six search warrants which have just been introduced into evidence.

Mr. Shenker: That is correct. All of the material that is reflected in those exhibits represents material that was [fol. 73] confiscated—that is, represents part of the material, but is representative of the material that was confiscated on the 10th day of October, on the various locations, not all of the exhibits, however, were confiscated from any one location, that is a total—

STIPULATIONS OF COUNSEL RE OFFER OF STATE'S EXHIBITS IN EVIDENCE

Mr. Granoff: I am talking about the inventories.

Your Honor, the State would also like to ask counsel if they would be prepared to stipulate as to this fact: Here are four boxes of various publications which have heretofore been marked for identification as State's Exhibits 1 through 277. Will counsel be prepared to stipulate that all of these exhibits may be introduced into evidence in this case and will reflect completely all of the material which was confiscated pursuant to the six search warrants from each of the six locations involved in this case? In other words, are counsel prepared to stipulate that State's Exhibits 1 through 277 fully represent all of the publications and all of the material confiscated by the law enforcement agencies which are brought before this court for the purposes of determination, pursuant to counsel's—

Mr. Shenker: Counsel will stipulate that these exhibits represent a copy of some thirteen to fifteen thousand—how many did they seize altogether, more than fifteen thousand?

Mr. Granoff: I didn't personally count them.

[fol. 74] Mr. Shenker: —thousands and thousands of magazines, I think they will probably run over twenty thousand—of magazines that were confiscated on the date in question. However, I want to call the court's attention that these exhibits, all of these exhibits were not taken from any one location. In other words, there are some that were taken in one location, and others in another location, and that none of the exhibits which are anything but books and periodicals were taken from the Kansas City News Distributing Company, because the Kansas City News Distributing Company does not distribute photographs or any

other kind of material, excepting books and periodicals and magazines, of course.

Mr. Granoff: Well, Mr. Shenker, would this be a correct statement, then, that these exhibits 1 through 277 represent all of the publications which are in issue in this case, represent completely all of the material taken from all of the locations? However, of course, it is understood that, for example, I would like to say, Exhibit 1 may or may not have been in any of the other five locations.

Mr. Shenker: It is like Noah's Ark, it has a copy of everything.

Mr. Granoff: Everything is represented, and since you do represent all interests in this case, with the exception of a few, all of those interests are being protected by the [fol. 75] introduction of those exhibits.

Mr. Shenker: Yes.

Mr. Granoff: Be it so stipulated.

I should like to introduce into evidence State's Exhibits 1 through 277, and make them a part of this record.

(State's Exhibits 1 through 277, inclusive, being so offered, were received in evidence.)

Mr. Granoff: Mr. Shenker, Mr. Brown and Mr. Wagner, I should like to ask you at this time if you are prepared to stipulate that all of State's Exhibits 1 through 277 were intended either for sale, circulation, or other distribution in the Greater Kansas City Area?

Mr. Shenker: I am prepared to say this: That—with the exception of some periodicals which were returned, as they call it in the magazine trade, and were held by the Kansas City News Distributing Company to send back to the publishers—they have the right of return, and that is after a copy becomes old, such as, an example, the October issue was returned in October, because the October issue was on sale in September—with the exception of that—but I will say that they were circulated prior to their return by the dealers, and that at this time they were held to be returned to the publisher, so if it is a question whether they were circulated, the answer is we will stipulate they were, with the exception of those that were being held to be [fol. 76] returned to the publishers because they were out

of date, all of them were held for the purposes of circulation.

Mr. Granoff: May we stipulate as to this, as to those publications which were being held for return, they had originally been intended for sale and circulation.

Mr. Shenker: And they were circulated for sale in this area, that is correct.

Mr. Granoff: Be it so stipulated.

Mr. Wagner, may it be understood that the stipulation which Mr. Shenker and I have entered into will also go to all of the exhibits which are applicable to your client, Ruback's?

Mr. Wagner: It is agreeable.

Mr. Granoff: Mr. Brown, I understand that you represent the publication "Playboy," may it be stipulated between you and myself that "Playboy" was intended for circulation in this community?

Mr. Brown: Yes. That is agreeable.

Mr. Granoff: Thank you, sir.

Noon Recess

[fol. 77] Mr. Granoff: Mr. Atzenweiler, will you take the stand.

Roger M. Atzenweiler, being sworn, testified as follows:

Direct examination.

By Mr. Granoff:

Q. Mr. Atzenweiler, for the record please state your full name?

A. Roger M. A-t-z-e-n-w-e-i-l-e-r.

Q. Where do you live, sir?

A. 9621 Sagamore Road.

Q. What is your occupation?

A. I am a professional photographer.

Q. Can you tell us something about your educational background in this field?

A. Yes. I am a graduate of the Kansas City University; I attended Kansas City Art Institute and School of Design;

graduate of the Naval School of Photography, at Pensacola; under the auspices of the Navy, worked with Metro-Goldwyn-Mayer; worked as a naval aviator and photographer overseas in aerial photography; right now I am president of the Greater Kansas City Photographic Association. I own and operate two studios, one specializing in portraiture, mainly; and do have several illustrative accounts, however, that we do for advertising agencies.

[fol. 78] Q. Do you hold any positions of honor in your profession nationally?

A. I have been appointed—it is awaiting confirmation—as a member of the Board of Directors; I am not yet officially a member of the Board, yet.

Q. Mr. Atzenweiler, are you ever called upon to give your opinion as an expert in the field of photography upon the merits, if any, of the work of other photographers?

A. Yes; I have been a judge in several photography exhibits.

Q. Can you tell the court generally how you go about passing upon the merit, if any, of photographs?

A. Well, a photograph is—

Mr. Shenker: May I submit, Your Honor, at this time that that testimony is certainly incompetent and irrelevant to the points at issue in this case, doesn't tend to prove or disprove any of the allegations. I am differentiating between his testimony, this question, and the qualifications. Now he is going into the question of photography, and certainly it doesn't have any bearing upon the issues in this matter, doesn't tend to prove or disprove anything; purely incompetent.

The Court: Overruled at this time. We will see how far we can get in it.

By Mr. Granoff:

Q. The court said that you may answer, Mr. Atzenweiler. How do you go about judging the merit, if any, of photo-

[fol. 79] graphs?

A. A photograph, in my opinion, is taken either to teach something—

Mr. Shenker: I will object to that as not responsive to the question, if the court please.

Mr. Granoff: May it please the court, I think that the witness is trying to explain how he does go about passing upon photographs as an expert.

The Court: Let him answer. I will let him answer at this time.

A. In our opinion, a photograph is designed to sell something, teach something, or create an impression. If it creates an impression, there are many different types. It can create a sensual impression, a base impression, an aesthetic impression, or many different types of impressions. As to what constitutes a good photograph or a bad photograph, you would have to judge it from the reason the photograph was taken. There is—

Mr. Shenker: I will ask that that last part of the statement be stricken, Your Honor, as well as the statement that he made, on the ground that that was not responsive to the question. The question, as I understand it, was how he judges a photograph, not why they were taken.

The Witness: That is part of the question.

Mr. Granoff: I think obviously, Your Honor, that in [fol. 80] passing upon the merit of a photograph you must necessarily take into consideration the purpose for which the photograph was taken. I think that the witness—

The Court: Let me give you my view at this moment.

Mr. Granoff: All right.

The Court: I don't think this witness is any more qualified to pass on whether a picture is obscene than this court.

Now, with that understanding, I will let you examine him, but that is going to be my position in the matter. I think I am as competent as he is to judge whether a picture is obscene or what effect it would have on the general public.

Mr. Granoff: All right, Your Honor.

The Court: That is my view of it. He can testify as to whether it is a good photograph or an amateur photograph, or something of that character, but the ultimate fact, he cannot testify as to what this court is going to have to find. I understand that is the problem of this court.

Mr. Granoff: So that I will not be guilty of going against the wishes of the court, am I given to understand that the witness will be permitted to testify as to the professional purpose for which the photograph is intended?

The Court: No, I don't think so, because I think then that determines the question that this court has finally got to [fol. 81] determine.

Mr. Granoff: Then I shall try to keep within the bounds.

The Court: I know you won't ask questions consciously that would violate the court's order, but I might as well give you my view right now.

Mr. Granoff: Thank you, Your Honor.

By Mr. Granoff:

Q. Before coming to this courtroom, did you have the opportunity, Mr. Atzenweiler, of examining large quantities of photographs, pictorial magazines, and the like, in the office of the Prosecuting Attorney for this county?

A. I did.

Q. I hand you, sir, a quantity of loose photographs marked State's Exhibit 224. Please examine these carefully, and tell the court whether you had an opportunity to examine those photographs.

A. These appear to be the same photographs that I have examined.

Q. With the critical eye of an expert in this field, please characterize these photographs from the point of view as to the type of photography involved, and whether or not from a photographer's point of view they are good or bad photographic examples.

Mr. Shenker: I am going to object to that, if the court please, on the ground it is totally incompetent, irrelevant and immaterial to the point at issue in this case, usurping [fol. 82] the powers of the court; it is broad, calling for conclusion and speculation, doesn't tend to prove or disprove any of the allegations.

The Court: I will overrule it, with the reservation of what I have said about my viewpoint, the propriety of this sort of evidence.

Mr. Granoff: I understand. May I admonish the witness to please keep in mind the ruling of the court.

The Witness: I understand, as best I can. I am not an old hand; I am new at this.

The Court: I don't want you to testify as to what you think may be somebody's impression—

The Witness: I understand. The only thing I can testify is as to the technical professional quality of these photographs.

A. Neither the lighting or the posing, in my opinion, are —constitute quality that would make artistic professional photographs. That is what I would say.

Mr. Shenker: I will ask that the answer be stricken on the ground it is totally incompetent, irrelevant and immaterial, doesn't tend to prove or disprove any allegations—

The Court: I will overrule the objection.

By Mr. Granoff:

Q. Do these photographs have any commercial value?

Mr. Shenker: I will certainly object to that.

[fol. 83] The Court: Yes. That is asking for a conclusion, in the first place.

Mr. Granoff: Well, the witness is an expert in the field.

By Mr. Granoff:

Q. If I didn't make the question clear, do these have any commercial value, from the point of view of photography work, that is, for any commercial value, either in the form of reproduction or sale, that is, from a photographer's point of view? Do you understand my question, Mr. Atzenweiler?

A. Would you repeat that? It is a little vague.

Q. Let me put it this way: As a photographer, can you tell me whether this has any commercial value in the hands of a photographer, could a photographer use these for any commercial value?

Mr. Shenker: I am going to object to it on the ground it is totally incompetent, irrelevant and immaterial to the point at issue.

The Court: Let him answer. I can't see the materiality, but I will permit him to answer, and see what the answer is.

A. The only thing that I could say in that regard would be, to me commercial value means monetary. I would assume money, which means, could you sell these photographs, do they sell anything, and I would say no.

[fol. 84] Q. All right, sir. I now hand you what has been marked State's Exhibit 121. Please examine it and tell the court whether you have had an opportunity previous to today to look at that magazine?

A. I have seen this magazine, I don't know whether it is this identical magazine, but I have seen the magazine "Adam" before.

Q. Have you examined the photographs in this magazine, sir? Please do if you haven't.

A. Yes; I recall these photographs; I did see this magazine.

Mr. Granoff: Let the record please show that the witness is referring to pages 7, 8, and 9 of Exhibit 121, which is, I believe, the November issue of the magazine, "Adam", Volume One, Number Ten.

By Mr. Granoff:

Q. Now, examining those pages, in your opinion as a photographer, is that good or bad photography?

Mr. Shenker: Well, I am going to object again, if the court please, on the ground that this is selecting and asking for an opinion on the part of an exhibit. This exhibit shows on its face that it has some 66 pages, and he is asking for an opinion on the photography on 3 pages, 6, 7, and 8. In addition to the other objections that we have made, it is totally incompetent, irrelevant and invades the province of the court, doesn't tend to prove or disprove any of the allegations, and this witness certainly hasn't been qualified, [fol. 85] if there is such a way to qualify a witness, which I don't say that there is, certainly hasn't been qualified to testify, and we submit that the selecting of some parts of an exhibit and attempting to offer testimony on that is certainly totally incompetent.

Mr. Granoff: In respect to Mr. Shenker's wishes, the State is prepared to have this witness look at the photographs on each and every page of this publication, if necessary, to give his opinion regarding the quality of the photography portrayed.

Does that meet with your approval?

Mr. Shenker: I am objecting to all of it, I make the additional objection, it is testimony pertaining to a part of the exhibit.

The Court: Go ahead.

Mr. Granoff: The court said you may answer in regard to those pages, sir.

The Witness: Do you want me to look at the entire book?

The Court: I frankly don't know what you mean by good or bad photography.

Mr. Granoff: No, sir. I want to keep within the confines of the court's ruling. I would like to have the witness's opinion as to the quality of the photography work portrayed.

A. It is not art.

[fol. 86] Mr. Shenker: I will ask that that be stricken as not responsive to the question.

The Court: Sustained.

By Mr. Granoff:

Q. I now hand you what has been marked State's Exhibit 82, which is the 1958 issue of Photography Annual. I want you to please examine this carefully, Mr. Atzenweiler, and I want you to give the court your opinion as to the photographic quality of the work portrayed?

The Court: Is that an exhibit?

The Witness: Yes, sir.

Mr. Granoff: Eighty-two.

A. I would say this—

Mr. Shenker: We will offer the same objection to this, Your Honor, that we did to the others.

The Court: It is understood.

Mr. Granoff: I understand that objection goes to the entire line of this questioning.

The Court: Yes.

A. I would say that that book contains, as a whole, some of the finest examples of contemporary photographic work in the United States today.

By Mr. Granoff:

Q. Thank you, sir. Specifically directing your attention to page 124, which the record will show is a picture of a woman in a semi-nude condition, please give us your opinion as to the quality of that photography?

[fol. 87] Mr. Shenker: Same objection, Your Honor.

The Court: Yes. All right.

Same ruling.

A. I think both the technical and intrinsic value is very good.

By Mr. Granoff:

Q. In other words, are you in a position to give the court your opinion as an expert in this field what your opinion is on the mere portrayal of nudity as such?

A. Well, nudity, as such, has been used to teach figure drawing; it has been used under limited circumstances to sell products; and in some other circumstances it has been used to create impressions.

Q. In other words, the mere fact that a picture may be the picture of a nude does not make it bad photography, does it?

A. No.

Q. All right, sir. By the same token, please examine Exhibit 86, the 1957 issue of the Photography Color Annual, and let us have your impression as an expert on that publication?

Mr. Shenker: May the record then show that all of my objections go to this line of questioning, unless there is some special point brought up in a question, then I will just not repeat my objections.

The Court: That will be the understanding.
Mr. Shenker: Thank you.

A. I am familiar with this particular magazine, and to a [fol. 88] lesser degree it exemplifies some very fine photography.

Mr. Shenker: What exhibit is that?
Mr. Granoff: Number 86, Mr. Shenker.

By Mr. Granoff:

Q. Now, again directing your attention to State's Exhibit 224, on which you have already commented, and State's Exhibits 86 and 82, being these color photography annuals, is it not true that they both—all three exhibits portray various degrees of nudity?
A. That is correct.
Q. How do you distinguish, as an expert, these publications from the first exhibit, Number 224, which was shown to you?
A. These here are photographic reproductions, I would say, and with no pretense of portraying mood or artistic lighting or—

Mr. Shenker: That last part will certainly ask for an objection. It is one thing to say what it does and what it is, it is another thing saying there is no pretense of portraying—
The Court: Sustained.
Mr. Granoff: That is all.
Your witness, gentlemen.
Mr. Shenker: I move that all of this witness's testimony be stricken.
The Court: Overruled.

[fol. 89] Cross examination.

By Mr. Shenker:

Q. I might ask you just this: There has been an age-old dispute between experts as to what is art and what isn't art, isn't that right?
A. What is the dispute?

Q. Hasn't that been going on?

A. Are you telling me, or do you want me to answer?

Q. I am asking you.

A. I am not sure; I think there is a matter of opinion.

Q. You think it is a matter of opinion?

A. I think that over—that art transcends all language barriers, and that everybody understands it; I don't think a few people decree whether art is great or not.

Q. I see. It is a matter of opinion, isn't that right?

A. It is a matter of large opinion.

Q. And the opinion varies between different individuals?

A. I would say art is determined by the large masses of the people, not minorities.

Q. The minorities set themselves up as experts, but the masses determine, isn't that correct?

Mr. Granoff: Just a moment. That question is obviously argumentative, and I think it is quite apparent that this witness has expressed an opinion on this evidence all the way through. It is opinion evidence as an expert. I see [fol. 90] no purpose to this type of cross-examination.

The Court: Overruled.

By Mr. Shenker:

Q. In other words, there are many articles that various people will have different opinions on the quality or merit or lack of merit to the articles, or the commodities, art commodities?

A. That is true of anything.

Q. That is right, and the same thing, of course, is true of photography?

A. It is true of anything.

Q. That is right. It is true of anything. And what might appear to you to be poor photography might appear to me to be excellent photography, isn't that right?

A. That is hardly likely; I mean it is possible.

Q. It is probable, too, isn't it?

A. Not really. If we are—if we have the same background and similar tastes.

Q. You mean, if we have the same background and similar tastes and we have the same training and the same experience?

A. No; not the same experience or training.
Q. But we have the same background?
A. A similar background.
Q. But if we have a different background, then it might strike me completely different than it would strike you, isn't that right?
A. It is very possible.

[fol. 91] Mr. Shenker: That is all.

Cross examination (Continued).

By Mr. Brown:

Q. Sir, would you examine the magazine "Playboy"?
A. Which issues?
Q. Have you September and October issues?
A. No, sir.
Q. Have you ever seen an issue of "Playboy"?
A. I have seen it on the news racks.
Q. Do you know that it travels through the United States Mail, second class mail?

Mr. Granoff: Just a moment, that question is totally incompetent and irrelevant to the issues of this case. We are concerned with the effect of this material on this particular community, and I don't think that that has any bearing whatsoever, what the United States postal authorities have done.

The Court: Overruled.

By Mr. Brown:

Q. Do you know that the magazine travels as second class mail through the United States of America?
A. Sir, I don't know how the magazine travels.
Q. I show you the last page of Exhibit 76, which is the October issue of "Playboy," and ask you if the photograph on that page tends to sell something?
A. I would say that the photograph itself doesn't tend to [fol. 92] sell anything, not the photograph; the entire page might.

Q. The entire page tends to sell something?

A. Yes; I think these definitely—this creates a definite impression.

Q. You are telling His Honor that the picture which appears in the upper left-hand page tends to sell nothing, in your opinion? Well, tell him yes or no.

A. It would be my opinion that this would create an impression and would just tend to sell no article in the picture.

Q. Well, now, tending to sell any article in the picture, would it tend as a whole to sell the gifts that are advertised on that page?

A. It would tend to bring my eye to the page.

Mr. Granoff: May it please the court.

Mr. Brown, I don't want to interrupt you unduly, but I would like to make this objection. I think the court has clearly indicated that it will not entertain any testimony dealing with the purpose behind or the intent behind any particular picture or publication, beyond the quality of the work portrayed. For that reason, I think that these questions are beyond the limits of the court's previous ruling.

Mr. Brown: His Honor ruled that you were entitled to show whether or not a picture tended to sell something. This witness has testified that this picture tends to catch [fol. 93] the eye and direct it to that page. I therefore submit that the testimony is admissible, and I would like to follow it up with another question.

The Court: What is the other question?

By Mr. Brown:

Q. The other question is this: Isn't the intent of advertising catching the eye?

A. You are telling me, or you are asking me?

The Court: He is asking you questions. You are a witness.

The Witness: Well, he sort of put that in my mouth, sir.

The Court: He said "is," he asked the question.

The Witness: Will you rephrase the question?

Mr. Brown: No, sir.

Read the question.

(Thereupon, the reporter read the last question.)

A. I would say that catching the eye plays a great part in advertising; yes.

By Mr. Brown:

Q. Yes, sir, and that picture catches the eye?
A. That picture catches the eye.
Q. You have taken pictures such as that, haven't you?
A. Exactly like that.
Q. Such as that, was my question.
A. In what manner do you mean that, exactly?
Q. Just the way I asked it.

[fol. 94] Mr. Schrader: Do you mean—eye-catching pictures?

The Witness: You mean semi-nude pictures, isn't that what you mean?

By Mr. Brown:

Q. Well, I don't remember that picture being semi-nude. Have you taken pictures such as that?
A. I have taken advertising pictures; yes.
Q. You mentioned taking pictures semi-nude. You have taken them nude, too, haven't you?
A. No, sir.
Q. Never?
A. Not completely unclothed.
Q. Not completely unclothed?
A. What do you consider a nude picture?
Q. Well, have you taken them where they are unclothed that much? Well, you surely can remember that without too much thought.
A. That—possibly.
Q. Yes, sir. Now, is the lighting good or bad on that picture? If it is bad, tell me what is bad about it.
A. It is adequate.
Q. That is one of the tests of good photography, isn't it? Didn't you say that lighting was one of the tests?
A. Lighting depending upon what kind of a mood it creates; yes.

Q. Would you say that girl there was posing or not posing? I think that is another one of the tests you used. [fol. 95] Is she posing or not posing?

A. Yes; that is posed.

Q. I am seeing what other criterion you set up.

A. Of course there are good poses and bad poses.

Q. The criterion was lighting and posing. We have both of those. I direct your attention to a page in Exhibit 34. It is three pages, folded into one, entitled "Miss September, Playboy's Playmate of the Month." Is the lighting there good or bad?

A. In order to qualify the lighting, you have to figure out what the picture is designed for, if the picture is designed, what is it designed to portray?

Q. Is the lighting good or bad?

A. For what that is designed to portray, I would say the lighting is very good.

Q. The lighting is very good. Leave it open. Is the girl posing or not?

A. Very bad pose.

Q. Well, she is posing?

A. No; I don't know. It looks to me like a more casual—

Q. If you don't know whether she is posing, how could it be bad posing?

A. The position is bad. Let me put it that way.

Q. Let me ask you this: One of the tests of commercial value is—I think you said what it is worth in the hand [fol. 96] of the photographer?

A. What did I say?

Q. Didn't you say that one of the tests whether a picture had commercial value was monetary value, what it would be worth in the hands of a photographer?

A. In other words, whether it would sell?

Q. Yes.

A. Yes, of course.

Q. Did you in all of your career ever sell a picture for as much as the man got for that picture?

A. How much did the man get for that picture?

Q. Tell me how much you ever got for one?

Mr. Granoff: That is totally incompetent, Judge. I don't see what that has to do with a—

The Court: Sustained.

By Mr. Brown:

Q. Would you have any idea what a picture like that would sell for?

A. Yes; I have made several.

Q. You have made several?

A. Not like this, but for that publication.

Mr. Granoff: May it please the court, I would like this objection to go to this entire line of questioning. It is a matter of public knowledge that dirt in some angles has financial value to it. I don't think that the monetary value of this is in any way revelant to the issues in this case.

[fol. 97] Mr. Brown: It is the third time the prosecutor has used the words. I think it is not proper for him to refer to any of these exhibits until the court rules, as to whether they are dirt, scum, or filth.

The Court: Overruled.

Go ahead.

By Mr. Brown:

Q. Would you answer the question?

A. What was the last question?

Q. What would you think the value of that picture would be in the hands of a photographer, the money, in money, how much would that be worth?

A. In my hands, it wouldn't be worth a dime.

Q. No, sir, not in your hands. Let's back up and take that: In your hands it wouldn't be worth a dime, because you wouldn't want to sell it?

A. I don't know who I could sell it to; I don't know.

Q. You have no idea what the photographer got for that picture?

A. About fifteen hundred dollars.

Q. Must have been of value then, wasn't it?

A. I don't know who he sold it to.

Q. In your opinion, he got about fifteen hundred dollars?
A. Yes; that is a guess, for that type of space.

Mr. Brown: That is all.

Redirect examination.

By Mr. Granoff:

Q. Mr. Atzenweiler, a few minutes ago you testified that [fol. 98] the lighting in a photograph must necessarily depend upon what the picture is designed to sell, is that right?
A. I think that is very poor.
Q. I want you to tell the court, in your opinion, since Mr. Brown has opened the subject, what that picture is designed to sell?

Mr. Brown: If Your Honor please, I object to that question as beyond the scope of this witness's ability to testify and beyond the ruling of the court.

Mr. Granoff: May it please the court, the entire trend of the cross-examination of this witness has been aimed at that very fact. I think that the State has every right to bring that out.

Mr. Brown: My examination was limited to the art questions, what he considered their value.

Mr. Granoff: The lighting, the artistic values, all of these things have to go to—as Mr. Brown himself put it—what the picture is designed to sell. I would like this witness to tell in his expert opinion what that picture is designed to sell.

Mr. Shenker: We would like to, just as a bystander, but since this is a dispute between the three, we would like to object to it, as far as we are concerned, in the entire hearing. It is totally irrelevant, incompetent, immaterial to the point at issue; this witness is obviously giving an [fol. 99] opinion, or has been called for an opinion, which he has not been qualified to state, and it grows way beyond the qualifications that this witness has testified to.

The Court: I think we are getting into a problem that will eventually be the court's authority. It is foreign to the issues, in my judgment.

Mr. Granoff: Well, Your Honor, I certainly am not trying to take issue with the court. I will abide by the rulings of the court. I would like to bring out this, that the purpose behind the photograph, the things—the impression it intends to create, are all things within the realm of the expert testimony of a photographer, I believe. Please stop me, Mr. Brown, if I am wrong, but I believe that counsel on the other side of the table themselves admitted that whether or not a picture or a publication is designed to sell something is of great material value to the issues in this case, just as his reference to the rear page of this publication was designed to bring out what, if anything, the picture was designed to sell. I would merely like the opportunity of asking this witness the same question.

The Court: I will let you ask him, but I think it is not a matter for this witness to testify to. I think that is the ultimate fact that the court has to determine.

Mr. Shenker: What it amounts to is this: What does he [fol. 100] make out of this picture? What does it mean to him? He is not a representative of the community. He is just one person of the community.

The Court: I am going to permit him to answer.

Mr. Granoff: I am sorry?

The Court: I am permitting him to answer, with the statement that I made just a moment ago.

By Mr. Granoff:

Q. Thank you.

My final question, sir: What is that picture designed to sell?

Mr. Brown: Same objection.

A. Well, that has a rim light, and any time—it is common knowledge when you use a rim light, silhouette, or outlining, the lighting is designed to show the figure, the body.

Q. In other words, your answer is that it is designed to sell the body?

A. That is right.

Mr. Granoff: No further questions.

Mr. Shenker: We will ask to strike that answer, if the court please, on the ground it is totally incompetent, and an opinion.

Mr. Brown: Same motion.

The Court: Well, be overruled.

Recross examination.

By Mr. Shenker:

Q. Just one question: One of the biggest things in ad-
[fol. 101] vertising, is it not, sir, is to get attention, isn't that right?

A. That is part of the story.

Q. To get attention, isn't that right?

A. That is part of the story.

Q. You may use something that is totally unrelated to the object which you are attempting to sell, in order to draw attention so that persons would read whatever is contained in that book or on that page, isn't that correct?

A. That is—

Q. That is the very basic thing of advertising?

A. That is part of the story.

Q. What is the rest—well, do you know of any better way to advertise than by creating something that will attract the eye or that will draw attention?

A. As I understand it, we are talking about products that are advertised.

Q. Talking about anything.

A. Anything. Dollars and cents today seem to be a very fine way to do it, just great big numbers.

Q. Just put in dollars and cents?

A. With the item advertised, seems to be a good way to do it.

Q. But the purpose is to draw attention?

A. Yes, sir.

Q. That is agreed? That is all I am asking.

A. That is right.

[fol. 102] Q. Regardless of what you use, the purpose is to draw attention?

A. Yes, sir; you have to do that.

Q. Once you draw the attention of the individual, it is for the purpose so he will get interested and buy your product, whether it is a DeSoto automobile, Mercury automobile, or any other product?

A. Yes; you have to draw attention.

Q. Including the sale of a magazine?

A. You have to draw attention.

Mr. Shenker: That is all.

Mr. Granoff: That is all.

(Witness excused.)

Dr. Stanley Stuber, being sworn, testified as follows:

Direct examination.

By Mr. Granoff:

Q. Dr. Stuber, for the record, please state your full name?

A. Stanley R. Stuber.

Q. Where do you live?

A. 7920 Tomahawk Road.

Q. Please tell the court your calling?

A. I am a clergyman.

Q. What denomination?

A. Baptist.

Q. Do you hold any position of honor in the clerical field in this community?

[fol. 103] A. I am the General Secretary of the Council of Churches of Greater Kansas City.

Q. Please tell the court just what the Council of Churches is?

A. The Council of Churches is composed of 224 members, major churches of the community, and the Council is based on membership by churches, and not individuals or clergymen.

Q. I see, it is representative of substantially the entire Protestant community?

A. Yes, sir.

Q. How long have you been a clergyman?

A. About 30 years.

Q. During the course of your ministerial duties are you called upon at any time to give advice or counsel on moral questions?

A. Oh, yes; many times.

Q. Prior to coming to this courtroom did you have an opportunity to examine a substantial number of magazines and books and other printed matter in the office of the Prosecutor here in this courthouse?

A. Yes, I did.

Q. During the course of your examination of this material did you have an opportunity to come to any opinion as to what moral effect the distribution of that material would have on the general Kansas City community?

A. Yes; taken as a whole—

The Court: Just yes.

Mr. Shenker: I understood he had just asked if he had [fol. 104] reached an opinion.

A. Just my personal opinion.

By Mr. Granoff:

Q. You did reach an opinion?

A. Yes; I reached an opinion.

Q. Doctor, I hand you what has been marked as State's Exhibits 67a, 121, 34, 76, and 137. Before you answer this question, please give counsel an opportunity to object, if they desire. This is my question: After examining these magazines, do you have an opinion as to what impact the distribution of those magazines will have on the moral fiber of this community?

Mr. Shenker: We are going to object to it, Your Honor. While he didn't ask what that opinion is, he is leading up to it. We would like to object to that, if the court please, on the ground it is totally incompetent, irrelevant, to the point at issue, and that that witness isn't any more competent than anyone else to testify as to what, if any, effect it would have, and I call Your Honor's attention to State vs. Becker, which was decided by the Missouri Supreme

Court, in dealing with the expert testimony that was—in that instance it happened to be me—that I saw fit to offer in connection with matters of this kind. Your Honor is undoubtedly familiar with the decision of the Supreme Court on that question.

The Court: Yes.

[fol. 105] Mr. Brown: The objection of Mr. Shenker goes to my client. I add, too, that it calls for the ultimate question before the court.

Mr. Shenker: This question would definitely invade the province of the court so far as permitting any witness to give an opinion.

Mr. Granoff: May I make a statement in that connection, too?

I think all of the gentlemen at the counsel table are familiar with State vs. Becker, as I know the court is. In that particular case the Supreme Court of Missouri held that an expert witness could not be used to testify on the fundamental issue which is before the court, namely, whether or not a given publication is obscene. I would like it clearly understood that the State's purpose in putting Dr. Stuber on the stand is not to elicit his opinion as to whether or not these publications are obscene, but as a clergyman, as a man over a period of years who is familiar with the general moral fiber of this community, I merely want him to testify as to what effect, if any, these publications will have upon the general morality if they are circulated. I think that that is distinguishable from an out and out opinion from this witness as to the obscene nature of the publications.

The Court: Well, he hasn't—have you examined those?

[fol. 106] The Witness: Yes.

The Court: What was the question?

Mr. Granoff: I asked this witness, Your Honor, in effect, what impact the distribution—

The Court: You asked whether he had an opinion as to what the impact—

Mr. Granoff: Yes; in his opinion what impact the circulation or distribution of these materials would have on the general morals of the Kansas City community.

The Court: All right, the objection will be sustained.

Offer of Proof on Behalf of State and Objection Thereto

Mr. Granoff: Well, in view of the court's ruling on the question, Your Honor, I think it would be useless for the State to ask Dr. Stuber any further questions. However, the State would like the opportunity of making an offer of proof, and may I also state, Your Honor, that it had been the intention of the State to place on the witness stand Dr. Samuel S. Mayerberg, of Congregation B'nai Jehudah, and also Father O'Brien, of the Catholic church in this community, who would, in essence, testify to the same things that Dr. Stuber would have testified to, and I should like to make an offer of proof at this time on those matters.

The Court: All right.

Mr. Granoff: Let the record show that had the witness Dr. Stanley Stuber been permitted to testify in this case, [fol. 107] his testimony would have been to the effect that a substantial quantity of the material which is in issue in this case would have had a detrimental impact on the moral fiber of the Kansas City community if it were available for general circulation.

Due to the fact that there is such a wealth of exhibits in this case, it would [sic] impossible, absent further actual examination on the stand at this time, and for the purposes of this offer of proof, to state just which publications the doctor would have testified would have had that adverse effect.

In view of the fact that we are dealing, Mr. Shenker, and gentlemen, with such large quantities of material, will you agree that that would have been the extent of the testimony, and it would have been adequate had it been otherwise admissible? I can't refer to the specific publications.

Mr. Shenker: No, I will object to whatever offer of proof you make.

The Court: I think maybe this would clarify it—this is just a suggestion—that he will agree that if the witnesses took the stand that they would testify to what, in effect,

that this witness would testify—not that you are admitting this is admissible—don't agree to anything you don't want to.

[fol. 108] Mr. Shenker: Why doesn't he just do it this way: Just make it an offer of proof that you would call witness so and so, and he would testify so and so, and I will object to the offer of proof. I don't want to agree he would so testify.

Mr. Granoff: I am not asking that. The thing I am asking is that my offer of proof is adequate to the extent that it sufficiently states in the record what the witness would have testified to if he had been permitted to testify, not that you will agree with what he says or that it is admissible. In other words, just merely an offer of proof itself is adequate.

Mr. Shenker: I don't want to be in a position to agree, you just say what your offer of proof is. I don't care how far you go. I will object.

Mr. Granoff: That is the State's offer of proof. Let the record further show that the State had intended to call as witnesses in this case Dr. Samuel S. Mayerberg, of Congregation B'nai Jehudah, and Father O'Brien, the Assistant Superintendent of Catholic Education, and Chairman of the Catholic Legion of Decency. The testimony of these two witnesses would have been substantially the same as the testimony of Dr. Stuber, but due to the fact that the court has made its ruling in regard to the testimony of Dr. Stuber, we are making this offer of proof in lieu of putting [fol. 109] either of those two gentlemen on the stand.

Mr. Shenker: We are objecting to the offer of proof, for the reasons previously given.

The Court: Objection sustained, because that answer would invade the province of this court.

(Recess.)

Mr. Granoff: May it please the court, in view of the rulings of His Honor as to the inadmissibility of certain evidence, the State has no further witnesses to present at this time, and rests its case.

STATE RESTS

[fol. 110] MOTIONS ON BEHALF OF DEFENDANTS FOR RETURN OF PROPERTY, ETC.

Mr. Shenker: At this time, if it please the court, at the close of the introduction of all of the evidence that the State has to offer in support of this—to justify their position, each of the parties aggrieved by this search are moving the court for the return of all of the property, on the ground that there was no showing made here sufficient to show any justification for the search, and are incorporating in our motion all of the grounds which we have previously set up.

This would end the litigation, and we would get our property back.

The Court: Well, I will take this motion under advisement.

Mr. Shenker: Under those circumstances, Your Honor, then we would like to ask in view of the court taking this motion under advisement, we would like to have about three or four days to determine that in the event—as to whether we will decide to offer any evidence in support of our contentions or not, and in the meantime, also forward to the court such written motions as are appropriate, which we received leave of court at the beginning of the case to file.

The Court: All right. The matter will be kept open for further hearing.

[fol. 111] Mr. Shenker: Including the motion that we filed for dismissal—return of the property?

The Court: That is right.

Mr. Shenker: I have one further motion that I should like to make, Your Honor, pending the court's final determination either on the motion for the return of all the property or on the motion of—after all the evidence is in, if we put on or offer evidence, I should like to ask the court at this time for a return of all of the property, excepting the exhibits which have been marked and offered into evidence, which motion is predicated, if it please the court, on the ground that an irreparable injury and damage is being done and will continue, and damages which will-

be irreparable insofar as there is no body or individual that I know of at this time that—if it were developed that all or some of the publications were improperly confiscated and that financial losses would be sustained by the individuals—there is no one that they can hold accountable for it, so far as I know at this time, and on that basis and for those reasons I would ask the court to return all of the property, excepting—return now all of the property except those which have been marked as exhibits, and are being held for the court to look into and consider.

The Court: That motion will be taken under advisement, [fol. 112] but my suggestion is to file a motion, physical motion, paper motion.

Mr. Shenker: I will.

The Court: So I will have time to further consider it.

Mr. Granoff: May it please the court, for the sake of the record, of course the State will oppose all of the motions which counsel have indicated they intend to file, and in particular as to the final motion for the immediate return of the material which it has introduced into evidence. The State specifically objects to a return of that material, on the ground that we feel that Section 542.380 and Section 543.400, of the Missouri Revised Statutes, clearly indicate that this property was seized pursuant to duly issued warrants of this court, and therefore we feel that the court is without authority to direct a return of the other material pending a determination as to the obscene character of the exhibits which have been introduced into evidence.

Mr. Shenker: The record may show, Your Honor, that on all these various motions that are made, that in each motion, that they are not exclusive, that I am not abandoning any of the other contentions, but that all of the other contentions are incorporated in each of the motions.

The Court: I understand.

Mr. Brown: I would like to have it understood that the written motions filed this morning, filed by Mr. Shenker, [fol. 113] will be considered as also having been filed by my client, and the other written motions that will be filed later will go to my client as well.

The Court: That will be the understanding.

Is there anything further?

Mr. Granoff: There is nothing further at this time, so far as the State is concerned.

Mr. Shenker: Nothing further at this time so far as the defendant is concerned.

The Court: The court will stand adjourned.

Mr. Granoff: May I merely say this, Your Honor, that in the event that Mr. Shenker, and the other gentlemen here representing these various interests, decide to put on evidence in support of their position, the State reserves the right to put on any rebuttal evidence which we feel is necessary.

The Court: Of course. And the State will have full opportunity to state its position having to do with any of the motions filed, as far as that is concerned, before I rule.

[fol. 114]

IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI, AT KANSAS CITY, DIVISION NO. 9

OPINION—December 12, 1957

On October 10, 1957, pursuant to search warrants issued by this court under Section 542.380 of the Revised Statutes of Missouri, 1949, the Jackson County Sheriff's Office and the Kansas City, Missouri Police Department seized certain books, magazines, and other printed matter, in the possession of a wholesale distributing company, located at 3105 Euclid Avenue, and in the possession of certain retailers located at 5 West 12th Street, 1 East 39th Street, 221 East 12th Street, 123 East 12th Street, and 104 East 10th Street, all located in Kansas City, Jackson County, Missouri.

Pursuant to notices duly posted, as provided for in Section 542.400, Revised Statutes of Missouri, 1949, the owners of said property appeared by attorneys, and a hearing, pursuant to Section 512.410, Revised Statutes of Missouri, 1949, was held on the 23rd day of October 1957.

The following motions, and each of them, having been presented to the Court, after due consideration, are overruled:

a. Amended Motion of Ted's News Shop and Jack K. Rayburn for Immediate Return of Property Seized and to Quash Search Warrant.

b. Motion of Jack Gordon for Immediate Return of Property Seized and to Quash Search Warrant.

[fol. 115] c. Amended Motion of Title News Company and William Marcus for Immediate Return of Property Seized and to Quash Search Warrant.

d. Amended Motion of Town Book Store and Harvey Hammer for Immediate Return of Property Seized and to Quash Search Warrant.

e. Amended Motion of Ruback's News Stand and Harvey Hammer for Immediate Return of Property Seized and to Quash Search Warrant.

f. Amended Motion of Kansas City Distributors and Homer Smay for Immediate Return of Property Seized and to Quash Search Warrant.

Periodicals, books, magazines, and other printed matter were introduced in evidence as exhibits, and it was stipulated by the parties that the same were kept for the purpose of public sale, distribution and circulation. The court has read and studied each of the exhibits so introduced.

Statutes Applicable

The statutes applicable to the facts in this cause are as follows, to wit: Section 542.380, Revised Statutes of Missouri, reads as follows:

"Upon complaint being made, on oath, in writing, to any officer authorized to issue process for the apprehension of offenders, that any of the property or articles herein named are kept within the county of [fol. 116] such officer, if he shall be satisfied that there is reasonable ground for such complaint, shall issue a warrant to the sheriff or any constable of the county, directing him to search for and seize any of the following property or articles:"....

"(2) Any of the following articles, kept for the purpose of being sold, published, exhibited, given away or otherwise distributed or circulated, viz: obscene, lewd, licentious, indecent or lascivious books, pam-

phlets, ballads, papers, drawings, lithographs, engravings, pictures, models, casts, prints or other articles or publications of an indecent, immoral or scandalous character, or any letters, handbills, cards, circulars, books, pamphlets or advertisements or notices of any kind giving information, directly or indirectly, when, where, how or of whom any of such things can be obtained:" . . . .

542.420. Disposition of Property

"If the judge or magistrate hearing such cause shall determine that the property or articles are of the kind mentioned in Section 542.380, he shall cause the same to be publicly destroyed, by burning or otherwise, and if he find that such property is not of the kind mentioned, he shall order the same returned to its owner. If it appear that it may be necessary to use such articles or property as evidence in any criminal prosecution, the judge or magistrate shall order the officer having [fol. 117] possession of them to retain such possession until such necessity no longer exists, and they shall neither be destroyed nor returned to the owner until they are no longer needed as such evidence."

The Question to Be Determined by the Court

Were any or all of the publications and printed matter seized kept for the purpose of being sold, published, exhibited, given away, distributed or circulated, obscene, lewd, lascivious, indecent or of an immoral or scandalous character?

Our courts have many times stated the test for determining obscenity in matters such as those before the court. Thus, in the case of State vs. Mac Sales Company, Mo. App. 263, S. W. 2d 860, l.c. 863, the St. Louis Court of Appeals said:

"With reference to (4), supra, one test of obscenity is whether the article in question tends to deprave and corrupt the morals by inciting lascivious thoughts or arousing the lustful desire of those whose minds are open to such influences and into whose hands such a publication may fall." • • •

Again, in the case of State vs. Pfenninger, 76 Mo. App. 313, the Court described obscenity as follows:

> "Obscenity is such indecency as is calculated to promote the violation of the law and the general corruption of morals. It is applied to language spoken, written or printed, and to pictorial productions and include what is foul and indecent, as well as immodest, [fol. 118] or calculated to excite impure desires."

The Supreme Court of Missouri, in the case of State vs. Becker, 272 S. W., Page 282, decided October 11, 1954, speaking through Judge Conkling, said:

> "The words 'indecent, immoral or scandalous' as used in this statute, and particularly as used therein in connection with the words 'obscene, lewd, licentious and lascivious,' are not words of hidden or obscure or uncertain meaning. Those words are not technical terms of the law. The word 'indecent' is a common word of common understanding. It has been defined to mean unfit to be seen or heard; immodest; gross; obscene; offending against modesty and less than immodest; that which would arouse lewd or lascivious thoughts in the susceptible."

Again, the test of obscenity is set forth in 67 C. J., as follows:

> "The words of the statute 'obscene, lewd, licentious, indecent, lascivious, immoral, scandalous' are used therein as descriptive of the character of the publication prohibited to be possessed with intent to sell or circulate, are all synonymous of similar meaning. Those descriptive words are neither vague nor indefinite. They are words of common usage and understanding, and as used in this statute, and in the law, they have a meaning understood by all."

After thoroughly studying the exhibits heretofore re- [fol. 119] ferred to, and in the light of the tests laid down by the courts of this State, I am of the opinion that the

exhibits described in Schedule "A," which is attached hereto and made a part hereof, are obscene, lewd, licentious, lascivious, indecent, and of an immoral and scandalous character, within the meaning and intent of the Missouri Revised Statutes, 1949, Section 542.380.

It is therefore the order of this court that the above-numbered exhibits, described in Schedule "A" attached hereto, and copies of said exhibits, all in the possession of the Sheriff of Jackson County, shall be retained by said officer, as necessary evidence for the purpose of possible criminal prosecutions, and when such necessity no longer exists that said exhibits, and copies thereof, be then publicly destroyed by burning or otherwise, as provided for by law.

The Court further orders that all exhibits set forth in Schedule "B," which is attached hereto and made a part hereof, and copies of said exhibits, all in the possession of said Sheriff of Jackson County, Missouri, be returned to the owners thereof.

A Judgment has been entered this day in conformity with the views expressed herein.

Ben Terte, Judge.

[fol. 120]

SCHEDULE "A" TO OPINION

State's Exhibit 3	Cabaret, Volume Six
State's Exhibit 4	Modern Man, Volume Seven
State's Exhibit 7	Hep, October, 1957
State's Exhibit 12	Paris Life, December, 1957
State's Exhibit 21	Figure, Autumn
State's Exhibit 22	He, November, 1957
State's Exhibit 23	Monsieur, October
State's Exhibit 25	Model Studies, Volume Nine
State's Exhibit 26	Adam, Volume 1, No. 9
State's Exhibit 28	Adam, Volume 1, No. 11

State's Exhibit 29	Figure, Volume 17
State's Exhibit 30	21 Annual, 1956-57
State's Exhibit 36	The Fair Sex
State's Exhibit 37	Classic Photography, Autumn Issue
State's Exhibit 38	Gala, November
State's Exhibit 39	Sunbathing, October 1957.
State's Exhibit 45	Harem, November 1957
State's Exhibit 47	Master Photography, Winter Issue
State's Exhibit 51	Figure Studies, Number Ten
State's Exhibit 52	Art and Camera, Winter, 1957
State's Exhibit 55	Adam, Volume 1, No. 11
State's Exhibit 57	Modern Man Quarterly, Volume 8
State's Exhibit 59	Modern Man, October, 1957
State's Exhibit 60	American Sunbather & Nudist Leader, October, 1957

[fol. 121]

State's Exhibit 61	After Dark, December, 1957
State's Exhibit 63	Peter Gowland's Figure Photography
State's Exhibit 64	Modern Sunbathing's Nudist Yearbook, No. 5
State's Exhibit 65	Life Study, No. 12
State's Exhibit 66	Glamor Parade, December, 1957
State's Exhibit 67	Foto-rama, November, 1957
State's Exhibit 74	Modern Man, 1957 Yearbook of Queens
State's Exhibit 77	Peter Basch's Photo Ideas, Number 1
State's Exhibit 78	Photo Annual, '57

State's Exhibit 88	TNT, October, 1957
State's Exhibit 92	American Sunbather & Nudist Leader, October, 1957
State's Exhibit 94	Amateur Screen & Photography, Autumn 1957
State's Exhibit 95	Figure Studies Annual, Number Ten
State's Exhibit 97	Graphic Models, Number 6
State's Exhibit 98	Artists Models, No. 6
State's Exhibit 99	Life Study, No. 12
State's Exhibit 100	Darling Diana
State's Exhibit 102	Sunbathing for Health Magazine October, 1957
State's Exhibit 112	Foto, 29
State's Exhibit 117	Monsieur, October, 1957
State's Exhibit 117-A	21 Annual, 1956-57
[fol. 122]	
State's Exhibit 118	Gala, November, 1957
State's Exhibit 121	Adam, Volume 1, No. 10
State's Exhibit 124	Introducing Bonnie, No. 2
State's Exhibit 127	Unusual Models, No. 2
State's Exhibit 134	Gallery, Volume 3
State's Exhibit 135	Amateur Art and Camera, Volume 8, No. 3
State's Exhibit 137	Figure Quarterly, Volume Seventeen
State's Exhibit 142	Nifty Gals & Gags, December, 1957
State's Exhibit 143	Modern Glamour Girls, Series No. 1
State's Exhibit 144	Presenting Brandee Kayse, No. 8

State's Exhibit 145	Girls Beautiful, No. 25
State's Exhibit 146	Third Dimension Photos, No. 1
State's Exhibit 187	Dixie Sparkle
State's Exhibit 188	Queens of Hearts
State's Exhibit 189	Exotique, No. 16
State's Exhibit 192	Meet the Girls, Vol. 1, Issue 7
State's Exhibit 193	Gorgeous Model Brandee Kayse
State's Exhibit 194	Modern Sunbathing's Nudist Yearbook, No. 5
State's Exhibit 195	Photography Handbook, 327
State's Exhibit 196	Laurie
State's Exhibit 197	Exotique Photo Album, No. 4
State's Exhibit 198	Bizarre Party, 1957
State's Exhibit 199	Unusual Models, No. 3
State's Exhibit 200	Cynthia

[fol. 123]

State's Exhibit 201	Buxie, No. 6
State's Exhibit 202	Presenting Carol Haze
State's Exhibit 205	Sweet Sue
State's Exhibit 208	Art Studies, No. 1
State's Exhibit 209	How to Take Glamour Photos, 285
State's Exhibit 210	Peter Basch's Photo Studies, 350
State's Exhibit 211	Presenting Cynthia
State's Exhibit 214	Exotique Photo Album, No. 3
State's Exhibit 215	Salon Photography, 306
State's Exhibit 217	Peter Basch's Glamour Photography, 313
State's Exhibit 218	Modern Man Quarterly, Volume 8

State's Exhibit 224	Photographs
State's Exhibit 226	Photographing the Female Figure, 348
State's Exhibit 227	Prize Winning Photography, 340
State's Exhibit 228	Peter Gowland's Figure Photography, 250
State's Exhibit 230	Exotique, No. 12
State's Exhibit 232	Adrian Presents Nauncy Pierre
State's Exhibit 233	Good Photography, 346
State's Exhibit 234	Adam, Volume 1, No. 11
State's Exhibit 238	Adrian Presents Nauncy Pierre
State's Exhibit 239	Frenchie, Artist Model
State's Exhibit 240	Presenting Rosemary Clark, Art Deluxe, Series No. 2
State's Exhibit 241	Figure Photography, Sculpture, Painting, Volume Thirteen

[fol. 124]

State's Exhibit 243	Modern Glamour Girls, Series No. 1
State's Exhibit 244	Sunbathing Review, Fall, 1957
State's Exhibit 247	Camera in Paris, by Simon Nathan, No. 343
State's Exhibit 250	Figurette, No. 4
State's Exhibit 255	Figure Photography, Sculpture, Painting, Volume Fourteen
State's Exhibit 257	Are You Over Sexty, Olympian House
State's Exhibit 264	How to Achieve Sex Happiness in Marriage, Henry and Freda Thornton
State's Exhibit 271	The Sexpert's Travel Guide, Derby Press

Schedule "B" to Opinion

State's Exhibits	State's Exhibits	State's Exhibits
1	49	96
2	50	101
5		
6	53	103
8	54	104
9	56	105
10	58	106
11	62	107
13	67-A	108
14	68	109
15	69	110
16	70	111
17	71	113
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18	72	114
19	73	115
20	75	116
24	76	119
27	79	120
31	80	122
32	81	123
33	82	125
	82-A	
34	83	126
35	84	128
40	85	129
41	86	130
42	87	131
43	89	132
44	90	133
46	91	136
48	93	138
139	173	229
140	174	231
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147	176	236
148	177	237
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State's Exhibits	State's Exhibits	State's Exhibits
150	179	242
151	180	245
[fol. 126]		
152	181	246
153	182	248
154	183	249
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156	185	252
157	186	253
158	190	254
159	191	256
160	204	258
161	205	259
162	206	260
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164	212	262
165	213	263
166	216	265
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[fol. 127]

IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI, AT KANSAS CITY, DIVISION NO. 9

JUDGMENT—December 12, 1957

On this 12th day of December 1957, this cause having heretofore been duly submitted to the Court upon the pleadings, certain motions having been presented, and the evidence and proofs having been adduced, and the Court hav-

ing duly and carefully considered the same, it is, on the whole record,

Ordered and Adjudged:

(1) That the following motions, and each of them, be and hereby are overruled:

(a) Amended Motion of Ted's News Shop and Jack K. Rayburn for Immediate Return of Property Seized and to Quash Search Warrant.

(b) Motion of Jack Gordon for Immediate Return of Property Seized and to Quash Search Warrant.

(c) Amended Motion of Title News Company and William Marcus for Immediate Return of Property Seized and to Quash Search Warrant.

(d) Amended Motion of Town Book Store and Harvey Hammer for Immediate Return of Property Seized and to Quash Search Warrant.

(e) Amended Motion of Ruback's News Stand and Harvey Hammer for Immediate Return of Property Seized and to Quash Search Warrant.

[fol. 128] (f) Amended Motion of Kansas City Distributors and Homer Smay for Immediate Return of Property Seized and to Quash Search Warrant.

(2) State's Exhibits listed and described in Schedule A attached hereto and made a part hereof, and all copies thereof before this Court pursuant to the oral stipulation of counsel heretofore entered into in open court on the 23rd day of October, 1957, are hereby declared to have been kept for the purpose of public sale, distribution and circulation, and are further declared obscene, lewd, licentious, indecent, lascivious, immoral and scandalous within the meaning and intent of *Missouri Revised Statutes, 1949, Section 542.380.* Said exhibits, and all copies thereof before this Court, shall be retained by the Sheriff of Jackson County, Missouri, or by his deputies, as necessary evidence for the purpose of possible criminal prosecution or prosecutions, and, when such necessity no longer exists, said

Sheriff, or his deputies, shall publicly destroy the same by burning within thirty days thereafter.

(3) State's Exhibits listed in Schedule B attached hereto and made a part hereof, and all copies thereof before this Court pursuant to the aforesaid oral stipulation of counsel, shall be returned forthwith by the Sheriff of Jackson County, Missouri, or by his deputies, to the rightful owner or owners thereof.

It Is So Ordered.

Ben Terte, Circuit Judge.

[fol. 129] (Schedules "A" and "B" referred to in the above Judgment are not attached, but may be found in their entirety on pages 120 through 126.*)

IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI

JOINT MOTION OF KANSAS CITY NEWS DISTRIBUTORS AND HOMER SMAY, TED'S NEWS SHOP AND JACK K. RAYBURN, JACK GORDON, TITLE NEWS COMPANY AND WILLIAM MARCUS, TOWN BOOK STORE AND HARVEY HAMMER, AND RUBACK'S NEWS STAND AND HARVEY HAMMER FOR A NEW TRIAL—December 23, 1957

The Kansas City News Distributors and Homer Smay, Ted's News Shop and Jack K. Rayburn, Jack Gordon, Title News Company and William Marcus, Town Book Store and Harvey Hammer, and Ruback's News Stand and Harvey Hammer move the Court to set aside its opinion, judgment and orders of December 12, 1957, to grant them a new trial and to order the immediate return of all property seized. The grounds for this motion are as follows:

(1) The Court erred in finding that the exhibits listed and described in Schedule A and the copies thereof are "obscene, lewd, licentious, indecent, lascivious, immoral and scandalous within the meaning and intent of *Missouri Revised Statutes, 1949*, Section 542.380."

(2) The Court erred in overruling movants' oral motions to dismiss filed at the close of the entire case for the rea-

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* These pages refer to side folios in brackets.

son that the evidence was insufficient to sustain the judgment and orders.

(3) The Court erred in applying the tests and standards [fol. 130] of obscenity set forth in its opinion for the reason that these tests and standards are unconstitutional under *Roth* v. *United States* and *Alberts* v. *California*, 354 U. S. 476 and *Butler* v. *Michigan*, 352 U. S. 380, and the application of these tests and standards in determining whether or not the articles seized were obscene, lewd, licentious, indecent, lascivious, immoral and scandalous within the meaning of Section 542.380 R. S. Mo. 1949 impaired movants' right of freedom of speech and press in violation of Article I, Section 8 of the Missouri Constitution, and the free speech clause of Amendment I and the due process clause and the privilege and immunities clause of Amendment XIV of the United States Constitution.

(4) The Court erred in finding Section 542.380 and Section 542.400 R. S. Mo. 1949, and Rule 33 of the Rules of the Supreme Court of Missouri constitutional. Those sections and rule are unconstitutional in allowing a search warrant to be issued and property set forth seized ex parte without notice and without any hearing afforded to the owners of the property prior to such seizure, for the reason that it allows a search and seizure of books, pamphlets, and the other publications without notice or any hearing afforded to the owners of the property prior to seizure, for the purpose of determining whether or not these books, pamphlets and other publications are obscene, lewd, licentious, indecent, lascivious or of an immoral or scandalous character, and therefore constitutes a prior restraint or censorship [fol. 131] of said publications, impairing movants' freedom of speech and publication in contravention of Article I, Section 8 of the Missouri Constitution, and the freedom of speech and press clause of Amendment I of the United States Constitution. Such impairment of movants' speech and press deprived them of their privileges and immunities as citizens and their property without due process of law as guaranteed by the privileges and immunities and due process clauses of Amendment XIV of the United States Constitution. By reason of the foregoing, said search and

seizure were unreasonable and constituted a violation of Article I, Section 15 of the Missouri Constitution.

(5) The Court erred in finding Section 542.380 and Section 542.400 R. S. Mo. 1949, and Rule 33 of the Rules of the Supreme Court of Missouri constitutional. Those sections and rule are unconstitutional as applied in this case for the reason (a) that it allowed movants' periodicals and magazines to be seized by police officers and deputy sheriffs without notice or any hearing afforded to the movants prior to seizure for the purpose of determining whether or not these books, pamphlets and other publications are obscene, lewd, licentious, indecent, lascivious, or of an immoral or scandalous character, (b) that it allowed police officers and deputy sheriffs to decide and make a judicial determination after the warrant was issued as to which of movants' periodicals and magazines were "obscene, lewd, licentious, indecent and lascivious" or were of an "indecent, [fol. 132] immoral and scandalous character" and were subject to seizure, impairing movants' freedom of speech and publication in contravention of Article I, Section 8 of the Missouri Constitution, the freedom of speech and press clause of Amendment I of the United States Constitution. Such impairment of movants' speech and press deprived them of their privileges and immunities as citizens and their property without due process of law as guaranteed by the privileges and immunities and due process clause of Amendment XIV of the United States Constitution. By reason of the foregoing, said search and seizure were unreasonable and constituted a violation of Article I, Section 15 of the Missouri Constitution.

(6) The Court erred in finding the search warrants valid when they were improper upon their face because they are not directed to a person or persons by name, but to a class, and are not directed to any particular peace officer or officers as required by Rule 33.01 of the Rules of the Supreme Court of Missouri.

(7) The Court erred in finding the search warrants valid when they were illegally issued because the complaints for their issuance and the warrants themselves did not contain a description of the personal property to be searched for

and seized in sufficient detail and particularly to enable the person serving the warrant to readily ascertain and identify the same and thereby violated Rule 33.01 (b) of the [fol. 133] Rules of the Supreme Court of Missouri and further did not describe the things to be seized as nearly as may be making each search and seizure unreasonable in violation of Article I, Section 15 of the Missouri Constitution.

(8) The Court erred in finding the search warrants valid when they were illegally issued because they were issued without a finding by the Court that there was probable cause of reasonable grounds for their issuance and there was no proper showing of probable cause and therefore each search and seizure was unreasonable and constituted a violation of Article I, Section 15 of the Missouri Constitution.

(9) The Court erred for the reason that the property seized is not the type of property whose seizure is authorized by any statute of this State.

(10) The Court erred in finding that the search warrants were valid when they were illegally issued because they authorized a search and seizure of movants' magazines and publications prior to distribution and thereby constituted a prior restraint or censorship of said magazines and publications impairing movants' freedom of speech and publication in contravention of Article I, Section 8 of the Missouri Constitution, the freedom of speech and press clause of Amendment I of the United States Constitution. Such impairment of movants' speech and press deprived them of their privileges and immunities as citizens and their property without due process of law as guaranteed by the privi- [fol. 134] leges and immunities and due process clauses of Amendment XIV of the United States Constitution. By reason of the foregoing, said search and seizure were unreasonable and constituted a violation of Article I, Section 15 of the Missouri Constitution.

(11) The Court erred in finding that the exhibits in Schedule A and the copies thereof were obscene for the reason the magazines and publications seized are not

obscene or otherwise subject to penalty by statute and their seizure and the Court's order for destruction impaired movants' freedom of speech and publication in contravention of Article I, Section 8 of the Missouri Constitution, the freedom of speech and press clause of Amendment I of the United States Constitution. Such impairment of movants' speech and press deprived them of their privileges and immunities as citizens and their property without due process of law as guaranteed by the privileges and immunities and due process clauses of Amendment XIV of the United States Constitution. By reason of the foregoing, said search and seizure were unreasonable and constituted a violation of Article I, Section 15 of the Missouri Constitution.

(12) The Court erred in finding that the search warrants were valid when they were illegally issued because the complaints for their issuance each allege insufficient facts and was not supported by evidential facts from which a Court could determine the existence of probable cause and [fol. 135] thereby violated Rule 33.01 (a) of the Rules of the Supreme Court of Missouri.

(13) The Court erred in finding that the search warrants were valid when they were void because (a) each constitutes a general warrant to search and seize; (b) each is improper and insufficient on its face; (c) each complaint is not in the proper form prescribed by statute, Rule 33 of the Supreme Court Rules and Article I, Section 15 of the Missouri Constitution, and does not contain the necessary elements needed for the issuance of a valid search warrant; (d) each complaint and search warrant do not state facts constituting probable cause for the issuance of a search warrant; (e) each complaint and the search warrant state mere conclusions and do not particularize any alleged violations of the law which would authorize the issuance of a search warrant; (f) each does not prescribe a definite time for its execution; (g) Section 542.380 R. S. Mo., 1949, is unconstitutional for the reason that it authorized a Clerk of the Court to issue a search warrant and thereby allows a search warrant to issue without a judicial finding of probable cause in contravention of Article I, Section 15 of

the Missouri Constitution; (h) each was issued without proper oath and affirmation as required by Article I, Section 15 of the Constitution of the State of Missouri, as required by the Statutes of Missouri, particularly Section 542.380 R. S. 1949, and as required by Rule 33 of the Rules of the Supreme Court of Missouri; (i) each authorized a [fol. 136] search at night time and (j) each authorized a search within ten days after its issuance.

(14) The Court erred in finding the search warrants valid when there was no probable cause for believing the existence of the grounds on which the warrants were issued.

(15) The Court erred in finding the search warrants valid because the search and seizure were undertaken without probable cause.

(16) The Court erred in finding the search warrants valid because the articles seized were not described in the warrants and the officers were not otherwise lawfully privileged to seize the same.

(17) The Court erred in finding the search warrants valid when the warrants were improperly executed in that (a) the articles seized were not subject to seizure under any statute of Missouri, (b) the police officers and deputy sheriffs who executed the warrants were allowed to substitute their discretion for that of the Court and were allowed to make the judicial determination of what articles were within the meaning of the search warrants and subject to seizure, and (c) the articles seized were not subject to seizure under the freedom of speech and press clause of Article I, Section 8 of the Missouri Constitution, the freedom of speech and press clause of Amendment I of the United States Constitution and the seizure thereby impaired movants' right of freedom of speech and press as [fol. 137] guaranteed by these clauses. Such impairment of movants' speech and press deprived them of their privileges and immunities as citizens and their property without due process of law as guaranteed by the privileges and immunities and due process clauses of Amendment XIV of the United States Constitution. By reason of the foregoing, said search and seizure were unreasonable and con-

stituted a violation of Article I, Section 15 of the Missouri Constitution.

(18) The Court erred for the further reason that by reason of each and every ground heretofore enumerated each search and seizure and each search warrant were unreasonable and violative of movants' rights under Article I, Section 15 of the Missouri Constitution and the due process clause of Amendment XIV of the United States Constitution.

(19) The Court erred for the further reason that by reason of each and every ground heretofore enumerated and by reason of the applicable unreasonable search and seizure each movant is compelled to testify against himself in violation of the self-incrimination clause of Article I, Section 19 of the Missouri Constitution.

(20) The Court erred in finding that the exhibits listed and described in Schedule A and the copies thereof are subject to seizure and destruction because said finding impairs movants' rights of freedom of speech and press in violation of Article I, Section 8 of the Missouri Constitu-
[fol. 138] tion, and the free speech clause of Amendment I and the due process clause and the privileges and immunities clause of Amendment XIV of the United States Constitution.

(21) The Court erred (a) in overruling movants' motions and amended motions for immediate return of the property seized and to quash the search warrants, (b) in allowing Exhibits 1 to 277 inclusive to be admitted into evidence and (c) in entering its judgment and order for the reasons set forth in said motions and for the reasons set forth in paragraph 1 to 20 inclusive of this motion which reasons are herein incorporated by reference.

IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI

NOTICE OF APPEAL OF HARVEY HAMMER AND TOWN BOOK STORE—March 31, 1958

Notice is hereby given that Harvey Hammer and Town Book Store appeal to the Supreme Court of Missouri from the judgment and order entered in this action on December 12, 1957.

Morris A. Shenker, 408 Olive Street, St. Louis 2, Missouri, Ch 1-6116.

Louis Wagner, 1014 Argyle Building, Kansas City 6, Missouri, BA 1-7151, Attorneys for Appellants, Harvey Hammer and Town Book Store.

[fol. 139]

IN THE CIRCUIT COURT OF JACKSON COUNTY

MEMORANDA OF THE CLERK RE SERVICE OF NOTICES OF APPEAL

I have this day mailed by registered mail a copy of the within notice of appeal to each of the following persons at the address stated:

William A. Collet, Prosecuting Attorney, County Court House, Kansas City, Missouri;

John M. Dalton, Attorney General, Jefferson City, Missouri.

I have also mailed a copy of the notice of appeal to the Clerk of the Supreme Court, together with the docket fee deposited by appellant.

Dated March 31st, 1958.

Francis M. Cook, Circuit Clerk, By Eileen Robertson, Deputy Clerk.

IN THE CIRCUIT COURT OF JACKSON COUNTY

NOTICE OF APPEAL OF HOMER SMAY AND KANSAS CITY NEWS DISTRIBUTORS—Filed March 31, 1958

Notice is hereby given that Homer Smay and Kansas City News Distributors appeal to the Supreme Court of Missouri from the judgment and order entered in this action on December 12, 1957.

Morris A. Shenker, 408 Olive Street, St. Louis 2, Missouri, CH 1-6116, Attorney for Appellants [fol. 140] Homer Smay and Kansas City News Distributors.

IN THE CIRCUIT COURT OF JACKSON COUNTY

NOTICE OF APPEAL OF JACK GORDON—Filed March 31, 1958

Notice is hereby given that Jack Gordon appeals to the Supreme Court of Missouri from the judgment and order entered in this action on December 12, 1957.

Morris A. Shenker, 408 Olive Street, St. Louis 2, [fol. 141] Missouri, CH 1-6116, Attorney for Appellant Jack Gordon.

IN THE CIRCUIT COURT OF JACKSON COUNTY

NOTICE OF APPEAL OF HARVEY HAMMER AND RUBACK'S NEWS STAND—Filed March 31, 1958

Notice is hereby given that Harvey Hammer and Ruback's News Stand appeal to the Supreme Court of Missouri from the judgment and order entered in this action on December 12, 1957.

[fol. 142] Morris A. Shenker, 408 Olive Street, St. Louis 2, Missouri, CH 1-6116.

Louis Wagner, 1014 Argyle Building, Kansas City 6, Missouri, BA 1-7151, Attorneys for Appellants, Harvey Hammer and Ruback's News Stand.

[fol. 143]

IN THE CIRCUIT COURT OF JACKSON COUNTY

NOTICE OF APPEAL OF WILLIAM MARCUS AND TITLE NEWS COMPANY—Filed March 31, 1958

Notice is hereby given that William Marcus and Title News Company appeal to the Supreme Court of Missouri from the judgment and order entered in this action on December 12, 1957.

Morris A. Shenker, 408 Olive Street, St. Louis 2, Missouri, CH 1-6116, Attorney for Appellant William Marcus and Title News Company.

[fol. 144]

IN THE CIRCUIT COURT OF JACKSON COUNTY

NOTICE OF APPEAL OF JACK K. RAYBURN AND TED'S NEWS SHOP—Filed March 31, 1958

Notice is hereby given that Jack K. Rayburn and Ted's News Shop appeal to the Supreme Court of Missouri from the judgment and order entered in this action on December 12, 1957.

Morris A. Shenker, 408 Olive Street, St. Louis 2, Missouri, CH 1-6116, Attorney for Appellants, Jack K. Rayburn and Ted's News Shop.

[fol. 145]

IN THE CIRCUIT COURT OF JACKSON COUNTY

ORDER EXTENDING TIME FOR FILING TRANSCRIPT—June 27, 1958

For good cause shown the time for filing transcript on appeal in the above matter is extended to September 29, 1958.

6-27-58

Ben Terte, Judge.

IN THE CIRCUIT COURT OF JACKSON COUNTY

STIPULATION AS TO EXHIBITS

Come now the parties hereto, by their respective attorneys of record, and stipulate and agree that it is impractical to incorporate the Exhibits into the Transcript on Appeal herein, and that the same may be omitted from said Transcript and separately filed in the Appellate Court.

Loeb H. Granoff, Assistant Prosecuting Attorney.

Morris A. Shenker, Louis Wagner, Attorneys for Defendants.

[fol. 148]

IN THE SUPREME COURT OF MISSOURI

DIVISION NUMBER TWO

No. 46,900

IN RE: SEARCH WARRANT OF PROPERTY AT 5 WEST 12TH STREET, KANSAS CITY, MISSOURI,

—v.—

WILLIAM MARCUS AND TITLE NEWS COMPANY

No. 46,901

IN RE: SEARCH WARRANT OF PROPERTY AT 3105 EUCLID, KANSAS CITY, MISSOURI,

—v.—

JACK K. RAYBURN and TED'S NEWS SHOP

No. 46,902

IN RE: SEARCH WARRANT OF PROPERTY AT 1 EAST 39TH STREET, KANSAS CITY, MISSOURI,

—v.—

HARVEY HAMMER and TOWN BOOK STORE

No. 46,903

IN RE: SEARCH WARRANT OF PROPERTY AT
123 EAST 12TH STREET, KANSAS CITY, MISSOURI,

—V.—

HARVEY HAMMER and RUBACK'S NEWS STAND

No. 46,904

IN RE: SEARCH WARRANT OF PROPERTY AT
104 EAST 10TH STREET, KANSAS CITY, MISSOURI,

—V.—

HOMER SMAY and KANSAS CITY NEWS DISTRIBUTORS

No. 46,905

IN RE: SEARCH WARRANT OF PROPERTY AT
221 EAST 12TH STREET, KANSAS CITY, MISSOURI,

—V.—

JACK GORDON

APPEAL FROM THE CIRCUIT COURT OF JACKSON COUNTY

Honorable Ben Terte, Judge.

OPINION—July 13, 1959

These appeals are from proceedings under §§ 542.380-542.420 which provide for the seizure of publications alleged to be obscene and authorize their destruction if, after [fol. 149] a hearing, they are in fact found to be obscene. Six search warrants were obtained on October 10, 1957, from the Circuit Court of Jackson County by an officer of the Police Department of Kansas City. One of them was directed against the premises of a business wholesaling newspapers, books and magazines; the remaining five warrants were for premises on which were conducted displays and sales of such publications at retail.

The search warrants were executed on the same day and the returns were filed in court together with an inventory of the publications seized. A copy of the inventory was left with the persons in charge of the premises where the seizure was made. Notices were served upon the interested parties of a hearing to be held in the circuit court to determine whether the property seized constituted obscene, lewd, licentious, indecent, or lascivious material within the meaning of § 542.380 and whether it was subject to destruction pursuant to § 542.420. The claimants of the publications seized filed separate motions for the immediate return of the property seized and to quash the search warrant and a hearing of all issues was had before the trial court sitting without a jury.

By its judgment the trial court overruled the motions to quash the search warrants and found that 100 of the 280 publications in evidence were in violation of the Obscenity Statute, § 542.380. The remaining 180 publications and all copies thereof were ordered to be returned to the claimants. After unavailing motions for new trials, the claimants appealed. The appeals all present the same questions and have been consolidated.

This court has appellate jurisdiction because constitutional questions have been timely and properly presented. Art. V, Sec. 3, Constitution of Missouri 1945; State v. Becker, 364 Mo. 1079, 272 S.W.2d 283.

[fol. 150] Section 542.380 deals with the means of determining whether certain property, including publications alleged to be obscene, are of the kind prohibited by law and, insofar as here material, provides that upon a verified complaint a search warrant may be issued to a sheriff or any constable of the county directing him to search for and seize: "(2) Any of the following articles, kept for the purpose of being sold, published, exhibited, given away or otherwise distributed or circulated, viz.: obscene, lewd, licentious, indecent or lascivious books, pamphlets, ballads, papers, drawings, lithographs, engravings, pictures, models, casts, prints or other articles or publications of an indecent, immoral or scandalous character, or any letters, handbills, cards, circulars, books, pamphlets or advertisements or notices of any kind giving information, directly or in-

directly, when, where, how or of whom any of such things can be obtained; * * *."

Section 542.400 provides that the judicial officer issuing the warrant shall set a day not less than five nor more than twenty days after the date of service and seizure, "for determining whether such property is the kind of property mentioned in section 542.380, and shall order the officer having such property in charge to retain possession of the same until after such hearing." The section further provides for posting a written notice of the hearing on the premises where the property was seized and for delivering a copy of such notice to any person claiming an interest in such property. Section 542.420 authorizes the destruction of the property or articles if they are found to be of the kind mentioned in § 542.380(2).

Supreme Court Rule 33 and particularly 33.01, dealing with procedural aspects of searches and seizures, provides, inter alia, for the seizure of personal property where au- [fol. 151] thorized by statute if the verified complaint filed with the judge or magistrate states facts positively and not upon information and belief.

The appellants charge that these statutes and the court rule are violative of their constitutional rights of freedom of speech and press guaranteed by Art. I, Sec. 8, Constitution of Missouri 1945, and Amendment I of the United States Constitution as made applicable by the privileges and immunities and due process clauses of the Fourteenth Amendment of the United States Constitution, and guaranteed by the provisions of Art. I, Sec. 15, of the Missouri Constitution protecting them against unreasonable search and seizures. They say that the seizure without notice and an opportunity to be heard prior to seizure constitutes a prior restraint or censorship of the publications and allows the police officers and deputy sheriffs to make a judicial determination after the warrant was issued as to which of the appellants' periodicals and magazines were violative of the obscenity statutes and therefore subject to seizure. The appellants assert that freedom of speech and press occupy a preferred position among our constitutional guarantees, Murdock v. Pennsylvania, 319 U.S. 105, 63 S.Ct. 870, 87 L.Ed. 1292, and that there is a distinction between a

restraint imposed before circulation of a publication and a penalty imposed by reason of its circulation and that prior restraints can be justified only in most "exceptional cases", citing Near v. Minnesota ex rel. Olson, 283 U.S. 697-716, 51 S.Ct. 625-631, 75 L.Ed. 1357.

Conceding this much to be true, it must also be recognized as stated in Near v. Minnesota, supra, that "the authority of the state to enact laws to promote the health, safety, morals, and general welfare of its people is necessarily admitted", 51 S.Ct. 628; that "the protection even as to previous restraint is not absolutely unlimited", and that "the primary requirements of decency may be en- [fol. 152] forced against obscene publications." 51 S.Ct. 631. Also, in Roth v. United States, 354 U.S. 476, 485, 77 S.Ct. 1304, 1309, the Supreme Court held "that obscenity is not within the area of constitutionally protected speech or press." In State v. Becker, 364 Mo. 1079, 272 S.W.2d 283, 288-9, this court held: "It has been long held that the right of freedom of speech is subject to the state's right to exercise its inherent police power. The right of free speech is not an absolute right at all times and under all circumstances." The constitutionality of the penal obscenity statute, § 563.280, was attacked in the Becker case and it was held, inter alia, not to impair the constitutional guarantees of freedom of speech and press.

We cannot accept the appellants' contention that: "The possessor of publications should have the right to circulate his material subject to any criminal or other sanctions if the matter offends any governing obscenity such as Section 563.280, R. S. Mo. 1949."[1] Relegating the state to

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[1] Section 563.280, insofar as here pertinent, provides:

"Every person who shall manufacture, print, publish, buy, sell, offer for sale or advertise for sale, or have in his possession, with intent to sell or circulate, or shall give away, distribute or circulate any obscene, lewd, licentious, indecent or lascivious book, pamphlet, paper, ballad, drawing, lithograph, engraving, picture, photograph, model, cast, print, article or other publication of indecent, immoral or scandalous character, * * * shall, on conviction thereof, be fined not more than one thousand dollars nor less than fifty dollars, or be imprisoned not more than one year in the county jail, or both; * * *."

punishment of the fait accompli would overlook and neglect entirely government's right and duty to protect the public from character contamination and its unfortunate consequences. If obscenity is as destructive and weakening to the moral fiber as the federal and state governments have always considered it, then its dissemination should be prevented just as certainly as the spread of disease germs should be curbed among the members of a community. The courts have never hesitated to enjoin potential menaces to [fol. 153] public health or to approve the vaccination or innoculation of school children and others when reasonably required. Obviously, a state government does not have to permit the homes of its citizens to be destroyed by fire when the arson can be reasonably prevented. The contention stated has been decided adversely to the appellants in the Becker case, supra, as well as the Kingsley case which we shall now consider.

All of the constitutional questions here presented have been resolved adversely to the appellants' contention by Kingsley Books, Inc. v. Brown, 354 U.S. 436, 77 S.Ct. 1325, 1 L.Ed.2d 1469. This was a proceeding under the New York statute which is similar to that of Missouri. The New York act provided that upon a complaint being filed the issuance of a temporary injunction against the circulation of publications alleged to be obscene was authorized. If the court found the material to be obscene, a permanent injunction against its distribution could be issued and an order made for the destruction of the material. The Supreme Court of the United States held that the New York statute was not unconstitutional. It was held, 77 S.Ct. 1328(6), that the Fourteenth Amendment did not restrict the states to the use of criminal processes in seeking to protect its people of dissemination of pornography. The New York statute was held not to amount to prior censorship of literary products and not to violate the freedom of thought and speech protected by the Fourteenth Amendment.

The differences in the Missouri and New York statutes are in degree and not of kind. The New York statute provides for a hearing within one day after seizure and a decision within two days after hearing; the Missouri statute provides that the hearing shall be not less than five nor

more than twenty days after the seizure. This provision may redound to the benefit of the owners of the publications in preparing their cases for trial. There is no com- [fol. 154] plaint in this case that the appellants sought or desired an earlier hearing and it was refused. It has not been demonstrated that the difference in time of hearing is unreasonable. While publications are seized under the Missouri statute, no temporary injunction is issued as under the New York law. The dealers may continue to sell under the Missouri act if they have or can obtain the publications and desire to do so. The contention that the statutes and the Court rule are unconstitutional in the respects asserted is denied.

Apart from the judgment formally entered, the trial court filed in the office of the clerk of the circuit court a memorandum entitled "Opinion" in which the court, inter alia, set out the applicable statutes and, in connection with the test for determining whether the publications were obscene, lewd, lascivious, licentious, indecent and of an immoral character, cited and quoted from State v. Mac Sales Company, Mo.App., 263 S.W.2d 860, 863, State v. Pfenninger, 76 Mo.App. 313, 317, and State v. Becker, 346 Mo. 1079, 272 S.W.2d 283, 287. The appellants assert that the trial court applied the tests and standards of obscenity stated in those cases and that such tests and standards are violative of their rights of freedom of speech and press under the federal and state constitutions by virtue of the standards adopted by the Supreme Court of the United States in Roth v. United States and Alberts v. California, 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed. 1498, and Butler v. Michigan, 352 U.S. 380, 77 S.Ct. 524, 1 L.Ed.2d 412. It should be noted that the trial court's opinion states and *the judgment holds* that the 100 exhibits listed were obscene, lewd, licentious, lascivious, indecent and of an immoral and scandalous character "within the meaning and intent of *Missouri Revised Statutes, 1949, Section 542.380.*"

[fol. 155] The appellants are mistaken in their view of the holding of the Becker case which is controlling and the only one we need to discuss. They say the standard adopted was the effect of isolated portions of the publication upon particularly susceptible persons which has been construed

to be the rule announced in Regina v. Hicklin, 1868, L.R. 3 Q.B. 360, one of the authorities discussed in Becker. Regardless of the present validity of the Hicklin rule, that was not the standard applied in the Becker case. In announcing the mode of determination the court stated, 272 S.W.2d 286: "These questions have been considered and tested objectively as to the effect of these publications in their entirety upon persons of average human instincts." In this interpretation of Becker, this court is fortified by the opinion of the Supreme Court of the United States. In the Roth and Alberts case, the Becker case is listed as one of the decisions which has rejected the Hicklin test and substituted this standard: "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest." 354 U.S. 489, marginal note 26. Appellants' claim of error is denied.

Moreover, appellate review in a nonjury case is upon both the law and the evidence, as in actions of an equitable nature, and a trial court's memorandum or written opinion is not binding and preclusive even if deemed a statement of grounds of decision. Grapette Co. v. Grapette Bottling Co., Mo.App., 286 S.W.2d 34, 36; Fort Osage Drainage District of Jackson County v. Jackson County, Mo., 275 S.W.2d 326, 328; Hammond v. Crown Coach Co., 364 Mo. 508, 263 S.W.2d 362, 366; Hilmer v. Decher, Mo.App., 183 S.W.2d 321, 326; § 510.310-2.

The appellants next contend that the complaints and the search warrants issued pursuant thereto violated the search and seizure of the Missouri Constitution, Art. I, Sec. 15, and [fol. 156] Supreme Court Rule 33.01(b) in that (1) they did not describe the publications "to be searched for and seized in sufficient detail, and in particularity, to enable the person serving the warrant to readily ascertain and identify the same" and (2) the warrants were issued without a sufficient showing of probable cause. Both the complaints and the search warrants described the publications in the language of the statute, § 542.380(2). The constitution protects against "unreasonable searches and seizures" and provides that no search warrant "shall issue without describing the place to be searched, or the person or thing to

be seized, as nearly as may be; nor without probable cause * * *." Rule 33.01(b) provides that the search warrant must describe the place and property "in sufficient detail and particularity to enable the officer serving the warrant to readily ascertain and identify the same."

It is *unreasonable* searches and seizures that are prohibited by the constitution, so the determination must be whether the description of the publications was reasonably definite and particular considering the nature and character of the property involved. The proceeding under these statutes are essentially proceedings in rem having for their purpose the seizure and destruction of obscene material, gambling equipment and devices and the other prohibited property mentioned in § 542.380. The general rule distinguishing the particularization of property description required in this class of cases is well stated in 79 C.J.S. 861, Searches and Seizures, § 73f, as follows: "*Specific property; property of specified character.* Where the purpose of the search is to find specific property, it should be so particularly described as to preclude the possibility of seizing any other; but, if the purpose is to seize, not specified property, but property of a specified character, which, by reason of its character and of the place where, and the circumstances [fol. 157] under which, it may be found, if found at all, would be illicit, a description would be unnecessary and, ordinarily, impossible, except as to such character, place, and circumstances."

In 47 Am.Jur. 524, Searches and Seizures, § 37, there is this further statement: "A description of the property to be seized need not be technically accurate nor necessarily precise; and its nature will necessarily vary according to whether the identity of the property, or its character, is the matter of concern. Further, the description is required to be specific only so far as the circumstances will ordinarily allow. Thus, under a statute authorizing searches for gaming apparatus or implements, it is not sufficient to describe the property as goods, wares, and merchandise, or as chattels generally; but a search warrant commanding the seizure of 'gambling implements and apparatus used, kept, and provided to be used in unlawful gambling' on certain premises and in a certain building, is sufficiently

definite. So, in the case of warrants to search for smuggled goods or for lottery tickets, a general description is deemed sufficient."

In State v. Cook, 322 Mo. 1203, 18 S.W.2d 58, a search warrant requiring the officers to seize "all intoxicating liquors" found on the premises was held sufficiently definite and not to deprive the defendant of his "right to a trial by jury on the issue of the intoxicating character of the liquor seized." In North v. State, 159 Fla. 854, 32 So.2d 915, a warrant describing the property as "gambling implements and devices used for the purpose of gaming and gambling" was held sufficient. In Cagle v. State, 147 Tex.Cr. 354, 180 S.W.2d 928, a warrant describing the property as implements being kept for: "The establishment and operation of a lottery, and the keeping and exhibiting of a policy game" was held sufficient to justify the seizure of a variety of [fol. 158] things used in conducting a policy game. In Frost v. People, 193 Ill. 635, 61 N.E. 1054, a warrant describing the property as "gaming instruments and apparatus" was held sufficient.

In the circumstances of this case we hold the search and seizure was not unreasonable for lack of a sufficient description of the property to be seized.

With respect to probable cause, the separate complaints or applications for the search warrants, which were sworn to by a lieutenant of the Kansas City Police Department, were presented to the Circuit Court by the police lieutenant and an assistant prosecutor of Jackson County. The complainant swore to the facts "of his own knowledge" and the court made a finding that there was probable cause to believe the allegations of the complaint to be true and that there was probable cause for the issuance of the search warrants. Supreme Court Rule 33.01 further defines the statutory procedure and provides that the judicial officer shall issue the warrant if the complaint is verified and supported by affidavits "stating evidential facts from which such judge or magistrate determines the existence of probable cause", but it also authorizes the issuance of the warrant if complaint states the facts "positively and not upon information and belief" as was done in this case. We deem the factual

allegations sufficient to support the finding of probable cause and the assignment of error is denied.

The search warrants were directed "to any peace officer in the state of Missouri." The appellants assert that this was improper and violative of their rights under Art. I, Sec. 15, of the Missouri Constitution and Supreme Court Rule 33.01 in that the warrants were not directed to a particular peace officer or officers by name. The constitution does not specify to whom a search warrant shall be addressed and § 542.380 provides that the judicial officer shall issue the warrant "to the sheriff or any constable of the county." Rule 33.01 provides the judge or magistrate shall [fol. 159] issue the search warrant "directed to any peace officer." Rule 33.02 provides: "Every such search warrant shall be executed by a peace officer and not by any other person." Section 542.290 provides: "Every such [search] warrant shall be executed by a public officer, and not by any other person."

In this regard the appellants rely upon United States v. Kohlman, 51 F.2d 313, which involved a federal search warrant in a prohibition case. It was held that a search warrant should be directed to a person or persons by name and not to a class and that it could only be executed in accordance with Title 11, Sec. 7, of the Espionage Act which provided that a federal search warrant may be served "by any of the officers mentioned in its direction, but by no other person, except in aid of the officer on his requiring it." 40 Stat. 229. Obviously, neither the statute nor the decision is controlling in this matter of state law.

The appellants make no contention that the warrants were served by any one without authority, but simply that the warrant was "improper on its face." The record shows the warrants were executed by deputy sheriffs of Jackson County together with officers of the Kansas City Police Department. We find no merit in appellants' contention and it is denied.

The appellants' remaining assignment is that the trial court erred in finding that the publications in question are obscene, lewd, licentious, indecent, lascivious, immoral and scandalous within the meaning and intent of § 542.380. As we have previously pointed out the Missouri rule as applied

in the Becker case is in accord with the standard approved by the Supreme Court of the United States in the Roth and Alberts case, which is: "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to [fol. 160] prurient interest." 354 U.S. 489. We have also held that the trial court's opinion or memorandum cannot be used to contradict the judgment formally entered even if it were inconsistent with the judgment; however, we do not so construe it.

It is impossible to adequately describe these exhibits and quite unnecessary. It is sufficient to say of them generally that they consist of pictures of young women, naked or nearly so, in suggestive and provocative poses with emphasis on bust development and lustful entreaty. The legends accompanying the pictures and other printed material add to the prurient interest created. It is stated on some of the publications that they are for artists and photographers or for some legitimate purpose and restricted use. However, the dominant character of the publications and the place and manner in which they were exposed for sale belie this thin disguise. Generally, the technical information on picture taking in these publications is less than that found on the leaflet in a roll of new film or in the pamphlet that accompanies the purchase of a modest camera. No one can seriously contend that any great work of art, literature, ideas or information will be lost to the world if these publications are not disseminated.

Our review of the evidence in cases tried upon the facts without a jury is "as in suits of an equitable nature" and the "judgment shall not be set aside unless clearly erroneous." Section 510.310-4. We have examined the exhibits and applied the tests approved in the Becker and Roth cases. While opinions may vary with regard to the proper classification of publications in that penumbral area between art and pornography, we do not find the judgment of the trial court to be "clearly erroneous" in any respect.

Accordingly the judgment is affirmed.

Eager, J. & Broaddus, Sp.J. concur

Clem F. Storckman, Presiding Judge.

[fol. 161]

IN THE SUPREME COURT OF MISSOURI, DIVISION TWO

[Title omitted]

ORDER OVERRULING MOTION FOR REHEARING AND GRANTING MOTION TO TRANSFER TO THE COURT EN BANC—
September 14, 1959

The Court having seen and considered the motion of the appellants for a rehearing herein, doth order that said motion be, and the same is hereby overruled. The Court also having seen and considered the motion of the appellants to transfer said consolidated causes to the court en banc, doth order that the motion be, and it is hereby sustained.

[fol. 162] [File endorsement omitted]

IN THE SUPREME COURT OF MISSOURI

EN BANC

No. 46,900

IN RE: SEARCH WARRANT OF PROPERTY AT
5 WEST 12TH STREET, KANSAS CITY, MISSOURI,

—v.—

WILLIAM MARCUS and TITLE NEWS COMPANY

No. 46,901

IN RE: SEARCH WARRANT OF PROPERTY AT
3105 EUCLID, KANSAS CITY, MISSOURI,

—v.—

JACK K. RAYBURN and TED'S NEWS SHOP

No. 46,902

IN RE: SEARCH WARRANT OF PROPERTY AT
1 EAST 39TH STREET, KANSAS CITY, MISSOURI,

—v.—

HARVEY HAMMER and TOWN BOOK STORE

No. 46,903

IN RE: SEARCH WARRANT OF PROPERTY AT
123 EAST 12TH STREET, KANSAS CITY, MISSOURI,

—v.—

HARVEY HAMMER and RUBACK'S NEWS STAND

No. 46,904

IN RE: SEARCH WARRANT OF PROPERTY AT
104 EAST 10TH STREET, KANSAS CITY, MISSOURI,

—v.—

HOMER SMAY and KANSAS CITY NEWS DISTRIBUTORS

No. 46,905

IN RE: SEARCH WARRANT OF PROPERTY AT
221 EAST 12TH STREET, KANSAS CITY, MISSOURI,

—v.—

JACK GORDON

APPEAL FROM THE CIRCUIT COURT OF JACKSON COUNTY

OPINION—March 14, 1960

Terte, Judge.

These appeals are from proceedings under §§ 542.380-542.420 which provide for the seizure of publications al-

leged to be obscene and authorize their destruction if, after [fol. 163] a hearing, they are in fact found to be obscene. Six search warrants were obtained on October 10, 1957, from the Circuit Court of Jackson County by an officer of the Police Department of Kansas City. One of them was directed against the premises of a business wholesaling newspapers, books and magazines; the remaining five warrants were for premises on which were conducted displays and sales of such publications at retail.

The search warrants were executed on the same day and the returns were filed in court together with an inventory of the publications seized. A copy of the inventory was left with the persons in charge of the premises where the seizure was made. Notices were served upon the interested parties of a hearing to be held in the circuit court to determine whether the property seized constituted obscene, lewd, licentious, indecent, or lascivious material within the meaning of § 542.380 and whether it was subject to destruction pursuant to § 542.420. The claimants of the publications seized filed separate motions for the immediate return of the property seized and to quash the search warrant and a hearing of all issues was had before the trial court sitting without a jury.

By its judgment the trial court overruled the motions to quash the search warrants and found that 100 of the 280 publications in evidence were in violation of the Obscenity Statute, § 542.380. The remaining 180 publications and all copies thereof were ordered to be returned to the claimants. After unavailing motions for new trials, the claimants appealed. The appeals all present the same questions and have been consolidated.

This court has appellate jurisdiction because constitutional questions have been timely and properly presented. Art. V, Sec. 3, Constitution of Missouri 1945; State v. Becker, 364 Mo. 1079, 272 S.W.2d 283.

[fol. 164] Section 542.380 deals with the means of determining whether certain property, including publications alleged to be obscene, are of the kind prohibited by law and, insofar as here material, provides that upon a verified complaint a search warrant may be issued to a sheriff or

any constable of the county directing him to search for and seize: "(2) Any of the following articles, kept for the purpose of being sold, published, exhibited, given away or otherwise distributed or circulated, viz.: obscene, lewd, licentious, indecent or lascivious books, pamphlets, ballads, papers, drawings, lithographs, engravings, pictures, models, casts, prints or other articles or publications of an indecent, immoral or scandalous character, or any letters, handbills, cards, circulars, books, pamphlets or advertisements or notices of any kind giving information, directly or indirectly, when, where, how or of whom any of such things can be obtained; * * *."

Section 542.400 provides that the judicial officer issuing the warrant shall set a day not less than five nor more than twenty days after the date of service and seizure, "for determining whether such property is the kind of property mentioned in section 542.380, and shall order the officer having such property in charge to retain possession of the same until after such hearing." The section further provides for posting a written notice of the hearing on the premises where the property was seized and for delivering a copy of such notice to any person claiming an interest in such property. Section 542.420 authorizes the destruction of the property or articles if they are found to be of the kind mentioned in § 542.380(2).

Supreme Court Rule 33 and particularly 33.01, dealing with procedural aspects of searches and seizures, provides, inter alia, for the seizure of personal property where au- [fol. 165] thorized by statute if the verified complaint filed with the judge or magistrate states facts positively and not upon information and belief.

The appellants charge that these statutes and the court rule are violative of their constitutional rights of freedom of speech and press guaranteed by Art. I, Sec. 8, Constitution of Missouri 1945, and Amendment I of the United States Constitution as made applicable by the privileges and immunities and due process clauses of the Fourteenth Amendment of the United States Constitution, and guaranteed by the provisions of Art. I, Sec. 15, of the Missouri Constitution protecting them against unreasonable search

and seizures. They say that the seizure without notice and an opportunity to be heard prior to seizure constitutes a prior restraint or censorship of the publications and allows the police officers and deputy sheriffs to make a judicial determination after the warrant was issued as to which of the appellants' periodicals and magazines were violative of the obscenity statutes and therefore subject to seizure. The appellants assert that freedom of speech and press occupy a preferred position among our constitutional guarantees, Murdock v. Pennsylvania, 319 U.S. 105, 63 S.Ct. 870, 87 L.Ed. 1292, and that there is a distinction between a restraint imposed before circulation of a publication and a penalty imposed by reason of its circulation and that prior restraints can be justified only in most "exceptional cases", citing Near v. Minnesota ex rel. Olson, 283 U.S. 697-716, 51 S.Ct. 625-631, 75 L.Ed. 1357.

Conceding this much to be true, it must also be recognized as stated in Near v. Minnesota, supra, that "the authority of the state to enact laws to promote the health, safety, morals, and general welfare of its people is necessarily admitted", 51 S.Ct. 628; that "the protection even as to previous restraint is not absolutely unlimited", and that "the primary requirements of decency may be en- [fol. 166] forced against obscene publications." 51 S.Ct. 631. Also, in Roth v. United States, 354 U.S. 476, 485, 77 S.Ct. 1304, 1309, the Supreme Court held "that obscenity is not within the area of constitutionally protected speech or press." In State v. Becker, 364 Mo. 1079, 272 S.W.2d 283, 288-9, this court held: "It has been long held that the right of freedom of speech is subject to the state's right to exercise its inherent police power. The right of free speech is not an absolute right at all times and under all circumstances." The constitutionality of the penal obscenity statute, 563.280, was attacked in the Becker case and it was held, inter alia, not to impair the constitutional guarantees of freedom of speech and press.

We cannot accept the appellants' contention that: "The possessor of publications should have the right to circulate his material subject to any criminal or other sanctions if the matter offends any governing obscenity such as Sec-

tion 563.280, R. S. Mo. 1949."[1] Relegating the state to punishment of the fait accompli would overlook and neglect entirely government's right and duty to protect the public from character contamination and its unfortunate consequences. If obscenity is as destructive and weakening to the moral fiber as the federal and state governments have always considered it, then its dissemination should be prevented just as certainly as the spread of disease germs should be curbed among the members of a community. The courts have never hesitated to enjoin potential menaces to [fol. 167] public health or to approve the vaccination or innoculation of school children and others when reasonably required. Obviously, a state government does not have to permit the homes of its citizens to be destroyed by fire when the arson can be reasonably prevented. The contention stated has been decided adversely to the appellants in the Becker case, supra, as well as the Kingsley case which we shall now consider.

All of the constitutional questions here presented have been resolved adversely to the appellants' contention by Kingsley Books, Inc. v. Brown, 354 U.S. 436, 77 S.Ct. 1325, 1 L.Ed.2d 1469. This was a proceeding under the New York statute which is similar to that of Missouri. The New York act provided that upon a complaint being filed the issuance of a temporary injunction against the circulation of publications alleged to be obscene was authorized. If the court found the material to be obscene, a permanent injunction against its distribution could be issued and an order made for the destruction of the material. The Supreme Court of the United States held that the New York statute was not

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[1] Section 563.280, insofar as here pertinent, provides:

"Every person who shall manufacture, print, publish, buy, sell, offer for sale or advertise for sale, or have in his possession, with intent to sell or circulate, or shall give away, distribute or circulate any obscene, lewd, licentious, indecent or lascivious book, pamphlet, paper, ballad, drawing, lithograph, engraving, picture, photograph, model, cast, print, article or other publication of indecent, immoral or scandalous character, * * * shall, on conviction thereof, be fined not more than one thousand dollars nor less than fifty dollars, or be imprisoned not more than one year in the county jail, or both; * * *."

unconstitutional. It was held, 77 S.Ct. 1328(6), that the Fourteenth Amendment did not restrict the states to the use of criminal processes in seeking to protect its people of dissemination of pornography. The New York statute was held, not to amount to prior censorship of literary products and not to violate the freedom of thought and speech protected by the Fourteenth Amendment.

The differences in the Missouri and New York statutes are in degree and not of kind. The New York statute provides for a hearing within one day after seizure and a decision within two days after hearing; the Missouri statute provides that the hearing shall be not less than five nor more than twenty days after the seizure. This provision may redound to the benefit of the owners of the publications in preparing their cases for trial. There is no com- [fol. 168] plaint in this case that the appellants sought or desired an earlier hearing and it was refused. It has not been demonstrated that the difference in time of hearing is unreasonable. While publications are seized under the Missouri statute, no temporary injunction is issued as under the New York law. The dealers may continue to sell under the Missouri act if they have or can obtain the publications and desire to do so. The contention that the statutes and the Court rule are unconstitutional in the respects asserted is denied.

Apart from the judgment formally entered, the trial court filed in the office of the clerk of the circuit court a memorandum entitled "Opinion" in which the court, inter alia, set out the applicable statutes and, in connection with the test for determining whether the publications were obscene, lewd, lascivious, licentious, indecent and of an immoral character, cited and quoted from State v. Mac Sales Company, Mo.App., 263 S.W.2d 860, 863, State v. Pfenninger, 76 Mo.App. 313, 317, and State v. Becker, 346 Mo. 1079, 272 S.W.2d 283, 287. The appellants assert that the trial court applied the tests and standards of obscenity stated in those cases and that such tests and standards are violative of their rights of freedom of speech and press under the federal and state constitutions by virtue of the standards adopted by the Supreme Court of the United States in Roth v. United States and Alberts v. California, 354 U.S.

476, 77 S.Ct. 1304, 1 L.Ed. 1498, and Butler v. Michigan, 352 U.S. 380, 77 S.Ct. 524, 1 L.Ed.2d 412. It should be noted that the trial court's opinion states and *the judgment holds* that the 100 exhibits listed were obscene, lewd, licentious, lascivious, indecent and of an immoral and scandalous character "within the meaning and intent of *Missouri Revised Statutes, 1949, Section 542.380.*"

[fol. 169] The appellants are mistaken in their view of the holding of the Becker case which is controlling and the only one we need to discuss. They say the standard adopted was the effect of isolated portions of the publication upon particularly susceptible persons which has been construed to be the rule announced in Regina v. Hicklin, 1868, L.R. 3 Q.B. 360, one of the authorities discussed in Becker. Regardless of the present validity of the Hicklin rule, that was not the standard applied in the Becker case. In announcing the mode of determination the court stated, 272 S.W.2d 286: "These questions have been considered and tested objectively as to the effect of these publications in their entirety upon persons of average human instincts." In this interpretation of Becker, this court is fortified by the opinion of the Supreme Court of the United States. In the Roth and Alberts case, the Becker case is listed as one of the decisions which has rejected the Hicklin test and substituted this standard: "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest." 354 U.S. 489, marginal note 26. Appellants' claim of error is denied.

Moreover, appellate review in a nonjury case is upon both the law and the evidence, as in actions of an equitable nature, and a trial court's memorandum or written opinion is not binding and preclusive even if deemed a statement of grounds of decision. Grapette Co. v. Grapette Bottling Co., Mo.App., 286 S.W.2d 34, 36; Fort Osage Drainage District of Jackson County v. Jackson County, Mo., 275 S.W.2d 326, 328; Hammond v. Crown Coach Co., 364 Mo. 508, 263 S.W.2d 362, 366; Hilmer v. Decher, Mo.App., 183 S.W.2d 321, 326; § 510.310-2.

The appellants next contend that the complaints and the search warrants based thereon violated the search and sei-

zure provisions of the Missouri Constitution, Art. I, Sec. 15, [fol. 170] and Supreme Court Rule 33.01(b) in that (1) they did not describe the publications "to be searched for and seized in sufficient detail, and in particularity, to enable the person serving the warrant to readily ascertain and identify the same" and (2) the warrants were issued without a sufficient showing of probable cause. Both the complaints and the search warrants described the publications in the language of the statute, § 542.380(2). The constitution protects against "unreasonable searches and seizures" and provides that no search warrant "shall issue without describing the place to be searched, or the person or thing to be seized, as nearly as may be; nor without probable cause * * *." Rule 33.01(b) provides that the search warrant must describe the place and property "in sufficient detail and particularity to enable the officer serving the warrant to readily ascertain and identify the same."

It is *unreasonable* searches and seizures that are prohibited by the constitution, so the determination must be whether the description of the publications was reasonably definite and particular considering the nature and character of the property involved. The proceeding under these statutes are essentially proceedings in rem having for their purpose the seizure and destruction of obscene material, gambling equipment and devices and the other prohibited property mentioned in § 542.380. The general rule distinguishing the particularization of property description required in this class of cases is well stated in 79 C.J.S. 861, Searches and Seizures § 73f, as follows: "*Specific property; property of specified character.* Where the purpose of the search is to find specific property, it should be so particularly described as to preclude the possibility of seizing any other; but, if the purpose is to seize, not specified property, but property of a specified character, which, by reason of its character and of the place where, and the circumstances [fol. 171] under which, it may be found, if found at all, would be illicit, a description would be unnecessary and, ordinarily, impossible, except as to such character, place, and circumstances."

In 47 Am.Jur. 524, Searches and Seizures, § 37, there is this further statement: "A description of the property to

be seized need not be technically accurate nor necessarily precise; and its nature will necessarily vary according to whether the identity of the property, or its character, is the matter of concern. Further, the description is required to be specific only so far as the circumstances will ordinarily allow. Thus, under a statute authorizing searches for gaming apparatus or implements, it is not sufficient to describe the property as goods, wares, and merchandise, or as chattels generally; but a search warrant commanding the seizure of 'gambling implements and apparatus used, kept, and provided to be used in unlawful gambling' on certain premises and in a certain building, is sufficiently definite. So, in the case of warrants to search for smuggled goods or for lottery tickets, a general description is deemed sufficient."

In State v. Cook, 322 Mo. 1203, 18 S.W.2d 58, a search warrant requiring the officers to seize "all intoxicating liquors" found on the premises was held sufficiently definite and not to deprive the defendant of his "right to a trial by jury on the issue of the intoxicating character of the liquor seized." In North v. State, 159 Fla. 854, 32 So.2d 915, a warrant describing the property as "gambling implements and devices used for the purpose of gaming and gambling" was held sufficient. In Cagle v. State, 147 Tex.Cr. 354, 180 S.W.2d 928, a warrant describing the property as implements being kept for: "The establishment and operation of a lottery, and the keeping and exhibiting of a policy game", was held sufficient to justify the seizure of a variety of [fol. 172] things used in conducting a policy game. In Frost v. People, 193 Ill. 635, 61 N.E. 1054, a warrant describing the property as "gaming instruments and apparatus" was held sufficient.

In the circumstances of this case we hold the search and seizure was not unreasonable for lack of a sufficient description of the property to be seized.

With respect to probable cause, the separate complaints or applications for the search warrants, which were sworn to by a lieutenant of the Kansas City Police Department, were presented to the Circuit Court by the police lieutenant and an assistant prosecutor of Jackson County. The complainant swore to the facts "of his own knowledge" and the

court made a finding that there was probable cause to believe the allegations of the complaint to be true and that there was probable cause for the issuance of the search warrants. Supreme Court Rule 33.01 further defines the statutory procedure and provides that the judicial officer shall issue the warrant if the complaint is verified and supported by affidavits "stating evidential facts from which such judge or magistrate determines the existence of probable cause", but it also authorizes the issuance of the warrant if complaint states the facts "positively and not upon information and belief" as was done in this case. We deem the factual allegations sufficient to support the finding of probable cause and the assignment of error is denied.

The search warrants were directed "to any peace officer in the state of Missouri." The appellants assert that this was improper and violative of their rights under Art. I, Sec. 15, of the Missouri Constitution and Supreme Court Rule 33.01 in that the warrants were not directed to a particular peace officer or officers by name. The constitution does not specify to whom a search warrant shall be addressed and § 542.380 provides that the judicial officer shall issue the warrant "to the sheriff or any constable of the county." Rule 33.01 provides the judge or magistrate shall [fol. 173] issue the search warrant "directed to any peace officer." Rule 33.02 provides: "Every such search warrant shall be executed by a peace officer and not by any other person." Section 542.290 provides: "Every such [search] warrant shall be executed by a public officer, and not by any other person."

In this regard the appellants rely upon United States v. Kohlman, 51 F.2d 313, which involved a federal search warrant in a prohibition case. It was held that a search warrant should be directed to a person or persons by name and not to a class and that it could only be executed in accordance with Title 11, Sec. 7, of the Espionage Act which provided that a federal search warrant may be served "by any of the officers mentioned in its direction, but by no other person, except in aid of the officer on his requiring it." 40 Stat. 229. Obviously, neither the statute nor the decision is controlling in this matter of state law.

The appellants make no contention that the warrants were served by any one without authority, but simply that the warrant was "improper on its face." The record shows the warrants were executed by deputy sheriffs of Jackson County together with officers of the Kansas City Police Department. We find no merit in appellants' contention and it is denied.

The appellants' remaining assignment is that the trial court erred in finding that the publications in question are obscene, lewd, licentious, indecent, lascivious, immoral and scandalous within the meaning and intent of § 542.380. As we have previously pointed out the Missouri rule as applied in the Becker case is in accord with the standard approved by the Supreme Court of the United States in the Roth and Alberts case, which is: "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to [fol. 174] prurient interest." 354 U.S. 489. We have also held that the trial court's opinion or memorandum cannot be used to contradict the judgment formally entered even if it were inconsistent with the judgment; however, we do not so construe it.

It is impossible to adequately describe these exhibits and quite unnecessary. It is sufficient to say of them generally that they consist of pictures of young women, naked or nearly so, in suggestive and provocative poses with emphasis on bust development and lustful entreaty. The legends accompanying the pictures and other printed material add to the prurient interest created. It is stated on some of the publications that they are for artists and photographers or for some legitimate purpose and restricted use. However, the dominant character of the publications and the place and manner in which they were exposed for sale belie this thin disguise. Generally, the technical information on picture taking in these publications is less than that found on the leaflet in a roll of new film or in the pamphlet that accompanies the purchase of a modest camera. No one can seriously contend that any great work of art, literature, ideas or information will be lost to the world if these publications are not disseminated.

Our review of the evidence in cases tried upon the facts without a jury is "as in suits of an equitable nature" and the "judgment shall not be set aside unless clearly erroneous." Section 510.310-4. We have examined the exhibits and applied the tests approved in the Becker and Roth cases. While opinions may vary with regard to the proper classification of publications in that penumbral area between art and pornography, we do not find the judgment of the trial court to be "clearly erroneous" in any respect.

Accordingly the judgment is affirmed.

All concur.

Clem F. Storckman, Presiding Judge.

[fol. 175]

IN THE SUPREME COURT OF MISSOURI

En Banc

No. 46,900-46,905

IN RE: SEARCH WARRANT OF PROPERTY AT 5 WEST 12TH STREET, KANSAS CITY, MISSOURI,

v.

WILLIAM MARCUS, et al.

PER CURIAM OPINION—March 14, 1960

Per Curiam.

In their supplemental brief filed for the hearing before the court en banc the appellants in their points relied on make this additional contention:

"The divisional opinion holding the warrants to sufficiently describe the items to be seized is erroneous in condoning the issuance of a general warrant for the seizure of publications and thereby violates appellants' freedom of speech and press under the First Amendment to the Constitution of the United States and deprives them of their

property without due process of law and their privileges and immunities as citizens as guaranteed by the due process and privileges and immunities clause of Amendment Fourteen of the United States Constitution."

This adds nothing to the scope of the contentions previously made and disposed of in the divisional opinion.

Appellants also cite Smith v. California, —— U.S. ——, 80 S.Ct. 215, 4 L.Ed.2d 205, decided since the decision in division. In the Smith case an ordinance which had the effect of imposing a strict criminal liability upon a bookseller possessing an obscene book without a showing that he had knowledge of its contents was struck down as infringing upon constitutional rights. This is not a criminal proceeding and a lack of guilty knowledge is not claimed. Our attention is also called to Kingsley International Picture Corp. v. Regents of the University of the State of New York, 360 U.S. 684, 79 S.Ct. 1362, 3 L.Ed.2d 1512. Neither these nor the other cases cited repudiate previous [fol. 177] holdings of the Supreme Court of the United States that obscene material is not within the protection of the constitutional guarantees of freedom of speech and the press. Roth v. United States, 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1498. In fact the Smith case reaffirms that proposition. Thus the purpose of the Missouri statute is not unlawful and we hold the procedures employed are in compliance with due process of law and not violative of other constitutional rights. The divisional opinion correctly rules the contentions made.

[fol. 178]

IN THE SUPREME COURT OF MISSOURI

[Title omitted]

ORDER OVERRULING MOTION FOR REHEARING—
April 11, 1960

Now at this day the court having seen and fully considered appellants' motion for a rehearing, doth order that said motion be, and the same is hereby overruled.

[fol. 179]

IN THE SUPREME COURT OF MISSOURI

IN THE MATTER OF SEARCH WARRANT OF PROPERTY AT 5 WEST 12TH STREET, KANSAS CITY, MISSOURI, Respondent,

vs. Appeal from the Circuit Court of Jackson County.

WILLIAM MARCUS and TITLE NEWS COMPANY, Appellants,

and

IN THE MATTER OF SEARCH WARRANT OF PROPERTY AT 3105 EUCLID, KANSAS CITY, MISSOURI, Respondent,

vs. Appeal from the Circuit Court of Jackson County.

JACK K. RAYBURN and TED'S NEWS SHOP, Appellants,

and

IN THE MATTER OF SEARCH WARRANT OF PROPERTY AT 1 EAST 39TH STREET, KANSAS CITY, MISSOURI, Respondent,

vs. Appeal from the Circuit Court of Jackson County.

HARVEY HAMMER and TOWN BOOK STORE, Appellants,

and

IN THE MATTER OF SEARCH WARRANT OF PROPERTY AT 123 EAST 12TH STREET, KANSAS CITY, MISSOURI, Respondent,

vs. Appeal from the Circuit Court of Jackson County.

HARVEY HAMMER and RUBACK'S NEWS STAND, Appellants,

and

IN THE MATTER OF SEARCH WARRANT OF PROPERTY AT 104 EAST 10TH STREET, KANSAS CITY, MISSOURI, Respondent,

vs. Appeal from the Circuit Court of Jackson County.

HOMER SMAY and KANSAS CITY NEWS DISTRIBUTORS, Appellants,

and

IN THE MATTER OF SEARCH WARRANT OF PROPERTY AT 221 EAST 12TH STREET, KANSAS CITY, MISSOURI, Respondent,

vs. Appeal from the Circuit Court of Jackson County.

JACK GORDON, Appellant.

JUDGMENT—March 14, 1960

Now at this day come again the parties aforesaid, by their respective attorneys, and the Court here being now sufficiently advised of and concerning the premises, doth consider and adjudge that the judgment aforesaid, in form aforesaid, by the said Circuit Court of Jackson County rendered, be in all things affirmed, and stand in full force and effect; and that the said respondents recover against the said appellants their costs and charges herein expended and have therefor execution. (Opinion filed)

[fol. 180] [File endorsement omitted]

IN THE SUPREME COURT OF MISSOURI

En Banc

No. 46,900

IN RE: SEARCH WARRANT OF PROPERTY AT 5 WEST 12TH STREET, KANSAS CITY, MISSOURI, Respondent,

v.

WILLIAM MARCUS and TITLE NEWS COMPANY, Appellants.

No. 46,901

IN RE: SEARCH WARRANT OF PROPERTY AT 3105 EUCLID, KANSAS CITY, MISSOURI, Respondent,

v.

JACK K. RAYBURN and TED'S NEWS SHOP, Appellants.

No. 46,902

IN RE: SEARCH WARRANT OF PROPERTY AT 1 EAST 39TH STREET, KANSAS CITY, MISSOURI, Respondent,

v.

HARVEY HAMMER and TOWN BOOK STORE, Appellants.

No. 46,903

In Re: Search Warrant of Property at 123 East 12th Street, Kansas City, Missouri, Respondent,

v.

Harvey Hammer and Ruback's News Stand, Appellants.

No. 46,904

In Re: Search Warrant of Property at 104 East 10th Street, Kansas City, Missouri, Respondent,

v.

Homer Smay and Kansas City News Distributors, Appellants.

No. 46,905

In Re: Search Warrant of Property at 221 East 12th Street, Kansas City, Missouri, Respondent,

v.

Jack Gordon, Appellant.

Notice of Appeal—Filed May 27, 1960

I. Notice is hereby given, pursuant to Rule 10 of the [fol. 181] Revised Rules of the Supreme Court of the United States, that Homer Smay, Kansas City News Distributors, William Marcus, Title News Company, Jack Gordon, Harvey Hammer, Town Book Store, Ruback's News Stand, Jack K. Rayburn, and Ted's News Shop, the appellants above named, hereby appeal to the Supreme Court of the United States from the final judgment of the Supreme Court of Missouri En Banc entered in this proceeding on March 14, 1960, whose finality was suspended by the filing

of a timely petition for rehearing which was overruled on April 11, 1960. This judgment affirmed the judgment of the Circuit Court of Jackson County, Missouri, at Kansas City, of December 12, 1957, which provided that appellants' publications, which had been seized, be retained by the sheriff until such time as they should be publicly destroyed and provided further that appellants' motions for the immediate return of the publications be denied.

This appeal is taken pursuant to 28 U. S. C. §1257(2).

II. The Clerk will please prepare a transcript of the record in this cause, for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the following:

(1) Consolidated transcript on appeal (pp. 1-146).

(2) Opinion of Division 2 of the Supreme Court, dated July 13, 1959.

(3) Order of Division 2 of the Supreme Court transferring the case to the Supreme Court En Banc, dated September 14, 1959.

(4) Opinion of the Court En Banc, dated March 14, 1960.

(5) Order of Supreme Court En Banc overruling petition for rehearing, dated April 11, 1960.

(6) Judgment of the Court En Banc.

(7) Notice of appeal.

[fol. 182] III. The following questions are presented by this appeal:

(1) Whether proceedings under Missouri statutes, §§542.380-542.420 R. S. Mo. 1949, preventing dissemination and distribution of publications alleged to be obscene (but not yet found to be offensive by any Court) by providing for their ex parte seizure before a trial or hearing is held for determining if their character warrants condemnation constitutes a censorship and previous restraint of the publications in violation of the constitutional right of freedom of speech and press under Amendment One of the

United States Constitution as made applicable to the states by Amendment Fourteen of the United States Constitution.

(2) Whether proceedings under Missouri statutes, §§542.380-542.420 R. S. Mo. 1949, preventing dissemination and distribution of publications alleged to be obscene (but not yet found to be offensive in any prior judicial determination) by permitting the general seizure by police officers and deputy sheriffs of property specified merely as of an obscene character rather than specified publications constitutes a censorship and previous restraint of the publications in violation of the constitutional rights of freedom of speech and press under Amendment One of the United States Constitution as made applicable to the states by Amendment Fourteen of the United States Constitution.

(3) Whether the Courts below applied unconstitutional tests and standards of obscenity under *Roth* v. *United States*, and *Alberts* v. *California*, 354 U. S. 476, and *Butler* v. *Michigan*, 352 U. S. 380, in determining whether the publications seized were obscene, and thus impaired appellants' right of freedom of speech and press under Amendment One, as incorporated in the due process and privileges and immunities clauses of Amendment Fourteen of the United States Constitution.

[fol. 183] (4) Whether the determination of the issue of obscenity by a trial judge applying unconstitutional tests and standards of obscenity and a review by an appellate court refusing to set aside the trial judge's judgment on the issue of obscenity because it was not "clearly erroneous" impaired appellants' right of freedom of speech and press under Amendment One as incorporated in the due process and privileges and immunities clauses of Amendment Fourteen of the United States Constitution.

(5) Whether the publications seized were obscene under the standard set forth in *Roth* v. *United States*, and *Alberts* v. *California*, 354 U. S. 476, and whether the finding that the publications were obscene violated appellants' freedom of speech and press under Amendment One of the United States Constitution, as incorporated in the due process

and privileges and immunities clauses of Amendment Fourteen of the United States Constitution.

(6) Whether Section 542.380 and Section 542.400 R. S. Mo. 1949, and Rule 33 of the Missouri Supreme Court Rules on their face and as applied to this case violate the due process and privileges and immunities clauses of Amendment Fourteen of the United States Constitution incorporating the free speech and press guarantees of Amendment One of the United States Constitution in imposing a prior restraint and censorship of publications by preventing their dissemination and distribution (a) by allowing the seizure of publications by police and deputy sheriffs from retail and wholesale magazine and news vendors without notice and without an opportunity to be heard prior to seizure in order to determine whether such publications are "obscene, lewd, licentious, indecent, or lascivious" or of "indecent, immoral or scandalous character" (b) by allowing police officers and deputy sheriffs under a general search warrant authorizing the seizure of [fol. 184] publications described in the search warrant merely as "obscene, lewd, indecent" or of an "indecent, immoral and scandalous character" to seize appellants' publications and (c) by allowing police officers and deputy sheriffs to decide and make a judicial determination in executing the general search warrants which of appellants' publications were "obscene, lewd, licentious, indecent and lascivious" or were of an "indecent, immoral and scandalous character" and as such were subject to seizure.

Morris A. Shenker, Bernard J. Mellman, Sidney M. Glazer, Attorneys for Appellants.

CERTIFICATE OF SERVICE (omitted in printing).

[fol. 185] Clerk's Certificate (omitted in printing).

[fol. 186]

SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER POSTPONING CONSIDERATION OF JURISDICTION—
October 10, 1960

Appeal from the Supreme Court of the State of Missouri.

The statement of jurisdiction in this case having been submitted and considered by the Court, further consideration of the question of jurisdiction is postponed to the hearing of the case on the merits.

October 10, 1960.

No. 1

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1960.

WILLIAM MARCUS, TITLE NEWS COMPANY, HOMER SMAY, KANSAS CITY NEWS DISTRIBUTORS, JACK GORDON, HARVEY HAMMER, TOWN BOOK STORE, RUBACK'S NEWS STAND, JACK K. RAYBURN, and TED'S NEWS SHOP,

Appellants,

v.

SEARCH WARRANT OF PROPERTY AT 104 EAST TENTH STREET, KANSAS CITY, MISSOURI, SEARCH WARRANT OF PROPERTY AT 3105 EUCLID, KANSAS CITY, MISSOURI, SEARCH WARRANT OF PROPERTY AT 1 EAST THIRTY-NINTH STREET, KANSAS CITY, MISSOURI, SEARCH WARRANT OF PROPERTY AT 123 EAST TWELFTH STREET, KANSAS CITY, MISSOURI, SEARCH WARRANT OF PROPERTY AT 5 WEST TWELFTH STREET, KANSAS CITY, MISSOURI, AND SEARCH WARRANT OF PROPERTY AT 221 EAST TWELFTH STREET, KANSAS CITY, MISSOURI,

Appellees.

On Appeal from the Supreme Court of Missouri, En Banc.

JURISDICTIONAL STATEMENT.

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INDEX.

Cases Cited.

Statutes Cited.

Rule Cited.

Constitutions Cited.

No. .....

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1960.

WILLIAM MARCUS, TITLE NEWS COMPANY, HOMER SMAY, KANSAS CITY NEWS DISTRIBUTORS, JACK GORDON, HARVEY HAMMER, TOWN BOOK STORE, RUBACK'S NEWS STAND, JACK K. RAYBURN, and TED'S NEWS SHOP,

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Appellees.

On Appeal from the Supreme Court of Missouri, En Banc.

JURISDICTIONAL STATEMENT.

Appellants appeal from the judgment of the Supreme Court of Missouri, en banc, entered on March 14, 1960, affirming a judgment of the Circuit Court of Jackson

County, Missouri, and submit this statement to show that the Supreme Court of the United States has jurisdiction of this appeal and that substantial questions are presented.

OPINIONS BELOW.

The opinions of the Supreme Court of Missouri, en banc (Appendix A, infra p. 18), are reported at 334 S. W. 2d 119. The opinion of the Circuit Court of Jackson County, Missouri (Appendix A, infra p. 33), is not reported.

JURISDICTION.

These proceedings were brought under Sections 542.380, 542.390, 542.400, 542.410 and 542.420 R. S. Mo., 1949, and Rule 33 of the Rules of the Supreme Court of the State of Missouri, which statutes and rule provide for the summary seizure of publications under search warrant and authorize their destruction if found to be obscene by a Court after seizure and a hearing. The judgment of the Supreme Court of Missouri, en banc, was entered on March 14, 1960 (Appendix A, infra p. 38), a timely petition for rehearing was overruled on April 11, 1960, and notice of appeal was filed in that Court on May 27, 1960. The jurisdiction of this Court to review this decision by direct appeal is conferred by 28 U. S. C. § 1257(2). The following decisions sustain the jurisdiction of this Court to review the judgment on direct appeal in this case. **Kingsley Books, Inc., v. Brown**, 343 U. S. 326; **Near v. State of Minnesota**, 283 U. S. 697; **Flournoy v. Wiener**, 321 U. S. 253, 261.

STATUTES INVOLVED.

Sections 542.380, 542.390, 542.400, 542.410, and 542.420 R. S. Mo., 1949, and Rule 33 of the Rules of the Supreme Court of Missouri, are set forth in the Appendix B, infra pp. 39-42.

QUESTIONS PRESENTED.

(1) Whether proceedings under Missouri statutes, §§ 542.380-542.420 R. S. Mo., 1949, and Rule 33 of the Missouri Supreme Court Rules preventing dissemination and distribution of publications alleged to be obscene (but not yet found to be offensive by any Court), (a) by providing for their ex parte seizure before a trial or hearing is held for determining if their character warrants condemnation and (b) by permitting the general seizure by police officers and deputy sheriffs from retail and wholesale magazine and news vendors of property specified merely as of an obscene character, authorize a censorship and previous restraint of publications in violation of the constitutional rights of freedom of speech and press under Amendment One of the United States Constitution as made applicable to the states by Amendment Fourteen of the United States Constitution.

(2) Whether the determination of the issue of obscenity by a trial judge applying unconstitutional tests and standards of obscenity and a review by an appellate court refusing to set aside the trial judge's judgment on the issue of obscenity because it was not "clearly erroneous" impaired appellants' right of freedom of speech and press under Amendment One as incorporated in the due process and privileges and immunities clauses of Amendment Fourteen of the United States Constitution.[1]

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[1] A third question in this case is as follows: (3) Whether the publications seized are obscene under the standard set forth in *Roth v. United States*, and *Alberts v. California*, 354 U. S. 476, and whether the finding that the publications are obscene violated appellants' freedom of speech and press under Amendment One of the United States Constitution, as incorporated in the due process and privileges and immunities clauses of Amendment Fourteen of the United States Constitution. Although appellants believe these publications are not obscene, this question is not being pressed because of the practical difficulties involved in examining 100 separate publications.

STATEMENT.

Sections 542.380-542.420, R. S. Mo. 1949, provide for the seizure of publications alleged to be obscene and authorize their destruction if they are in fact found to be obscene. Section 542.380 provides that upon a verified complaint a search warrant may be issued to a sheriff directing him to search and seize obscene books and publications which are kept for the purpose of distribution or circulation. Section 542.400, R. S. Mo. 1949, requires a hearing within five to twenty days after the search and seizure for determining the character of the property seized and commands that the officer in charge of the seized property "retain possession of the same until after such hearing." Subsequent to the seizure of the publications, the statute also requires notice of the seizure and a hearing opportunity to claimants. If the publications are found to be obscene after hearing, the statute authorizes their destruction. Rule 33 of the Rules of the Missouri Supreme Court deals with the procedural aspects of searches and seizures of personal property when authorized by statute.[2]

Acting under the above statutes, search warrants were obtained on October 10, 1957, from the Circuit Court of Jackson County, Missouri, by an officer of the Police Department of Kansas City. One warrant was directed against the premises of a business wholesaling newspapers, books and magazines, the remaining five warrants were for premises on which were conducted displays and sales of such publications at retail (R. 3-4). The warrants were issued after complaints were filed by the police officer alleging that on October 8, 1957, at the premises of the

[2] This rule was drafted and promulgated pursuant to authority granted the Court by Section 5 of Article V of the Constitution of 1945 of the State of Missouri which allows that Court to establish rules of practice and procedure for all Courts provided they do not change substantive rights.

respective appellants certain persons kept property described as "obscene books, papers, drawings, lithographs, engravings, pictures, prints and other articles or publications of an indecent, immoral and scandalous character" for the purpose of selling, publishing, exhibiting, or otherwise distributing it (R. 3). No publication was either specifically mentioned in the complaint nor displayed to the Court before the warrants were issued (R. 53-54). Upon these complaints the Circuit Court issued its search warrants authorizing the search of appellants' premises and the seizure of "said above-described property or any part thereof" and ordering that the property so seized be returned to the Court to be dealt with in accordance with law (R. 4-5).

The search warrants were executed on the issuing day and returns were filed in Court, together with an inventory of the 13,308 publications seized. A copy of the inventory was left with the person in charge of the premises when the seizure was made. Notices were served upon the interested parties of a hearing to be held in the Circuit Court to determine whether the publications seized constituted obscene, lewd, licentious, indecent, or lascivious material within the meaning of Section 542.380, R. S. Mo. 1949, and whether it was subject to destruction (R. 6-19A). Thereafter, appellants filed separate motions for the immediate return of the property seized and to quash the search warrants (R. 43-44, 20-28, 2-3).[3] These motions alleged, inter alia, that Section 542.380 and Section 542.400, R. S. Mo. 1949, and Rule 33 of the Missouri Supreme Court Rules, were unconstitutional for the reason that they per-

[3] Appellants, prior to the hearing filed original and supplemental motions to quash the search warrants and for the immediate return of the seized property (R. 43-44). Subsequent to the hearing, amended motions to quash the search warrants and for the immediate return of the seized property were filed (R. 20-28, 2-3).

mitted a search and seizure of publications ex parte without notice or hearing "prior to seizure" and thus constitute "a prior restraint or censorship of said publication," impairing appellants' freedom of speech and publication in violation of Amendment 1 of the United States Constitution, thereby depriving appellants of their privileges and immunities and of their property without due process in violation of Amendment 14 of the United States Constitution (R. 21-22). Similar constitutional objections were made to the application of the statute and rule to the instant cases and to the issuance of the search warrants (R. 22-25). The motions also alleged that the warrants were illegally issued because the complaints and the warrants did not describe the personal property to be searched for and seized in sufficient detail to enable the person serving the warrant to readily identify the same and that they did not describe the things to be seized as nearly as may be (R. 23-24).

At a hearing held pursuant to the notice given a Kansas City police officer assigned to its Vice Squad testified he had made an investigation of the five retail news stands involved, purchased five openly displayed magazines and then later signed the complaints for the search warrants (R. 49-50). He displayed no magazines to the Court prior to the issuance of the warrants, made no specific mention of any magazine in his complaints, and presented no evidence to the court (R. 53-55, 57). The parties from whom the property was seized were not notified that a complaint would be filed, and were not given an opportunity to be heard prior to the seizure (R. 55, 57). At each of the five retail newsstands, a police officer supervised the search and seizure of the property involved, made a personal selection and determination of which publications to seize and seized all publications which he decided were subject to seizure (R. 59-60, 64-66). At the wholesale distributor, the officers who searched had a list of

magazines to be seized prepared by the Police Department and further seized anything else which in their judgment merited seizure (R. 55, 68-70). The wholesaler had on hand hundreds of thousands of copies of periodicals (R. 70). The items seized were held for purposes of circulation (R. 72-76).

By its judgment on December 12, 1957, the trial Court overruled the motions to quash the search warrant and found that 100 of the 280 different publications were in violation of the obscenity statute, Section 542.380 (R. 114-128). In reaching this conclusion the trial judge applied the test of "whether the article in question tends to deprave and corrupt the morals by inciting lascivious thoughts or arousing the lustful desire of those whose minds are open to such influences and into whose hands such publications may fall". The trial judge also held that these publications should be retained by the sheriff as necessary evidence for the purpose of possible criminal prosecution and that then they should be destroyed (Appendix A, p. 33). No criminal prosecution was ever instituted. The remaining 180 publications and all copies thereof were ordered to be returned to their respective claimants. The publications found to be obscene included the following: Magazines designed to promote the cause of nudism (Exhibits 39, 60, 64, 102, 244); photography magazines containing articles and texts designed to assist photographers in taking photographs which contained some pictures of women with breasts or buttocks exposed (Exhibits 21, 29, 37, 47, 51, 52, 63, 77, 94, 95, 195, 209, 210, 215, 217, 226, 227, 233, 247); magazines containing texts and articles on a variety of subjects which contained some photographs of women with breasts or buttocks exposed (Exhibits 3, 4, 23, 26, 28, 30, 55, 57, 59, 61, 74, 121, 234); magazines containing articles on a variety of subjects designed for circulation among Negroes (Exhibit 7); magazines containing texts and articles by Grovanno Boccaccio

and Guy de Maupassant (Exhibits 22, 45), two books containing cartoons and jokes similar to those found in nationally known and circulated magazines (Exhibits 257, 271) and a book containing information and advice regarding the physical, psychological and emotional aspects of marriage (Exhibit 264).[4]

Appellants filed a timely motion for a new trial which realleged the constitutional violations set forth in their pretrial motions (R. 129-138). Objection was further made that the standard applied by the trial Court in its determination of the obscene was "unconstitutional under **Roth v. United States** and **Alberts v. California**, 354 U. S. 476, **Butler v. Michigan**, 352 U. S. 380," impairing appellants' "right of freedom of speech and press" in violation of "the free speech clause of Amendment 1 of the United States Constitution and the due process and privilege and immunities clause of Amendment 14 of the United States Constitution" (R. 129-130). This motion was not passed on by the Court within the 90 days after its filing and was thereby deemed denied by Missouri statute on March 23, 1958. Appellants then filed timely notices of appeal to the Supreme Court of Missouri (R. 138-144). On July 13, 1959, Division 2 of the Supreme Court of Missouri entered a decision affirming the judgment of the trial Court (R. 148-160). A timely motion to transfer the case to the Court en banc was filed and on September 14, 1959, the cases were transferred to the Supreme Court of Missouri en banc (R. 161).

The Missouri Supreme Court noted that "constitutional questions have been timely and properly preserved." It

[4] These publications are not obscene under the standard set forth in *Roth v. United States* and *Alberts v. California*, 354 U. S. 476. See *Sunshine Book Co. v. Summerfield*, 355 U. S. 372, reversing D. C. Cir., 249 F. 2d 114 and 128 F. Supp. 564; *One, Inc., v. Olesen*, 355 U. S. 371, reversing 9 Cir., 241 F. 2d 772; *Times Film Corporation v. Chicago*, 355 U. S. 35, reversing 7 Cir., 244 F. 2d 432.

summarized appellants' contention relative to the invalidity of the Missouri statute and rule as follows (Appendix A, p. 21):

> "The appellants charge that these statutes and the court rule are violative of their constitutional rights of freedom of speech and press guaranteed by Art. I, Sec. 8, Constitution of Missouri 1945, and Amendment I of the United States Constitution as made applicable by the privileges and immunities and due process clauses of the Fourteenth Amendment of the United States Constitution, and guaranteed by the provisions of Art. I, Sec. 15, of the Missouri Constitution protecting them against unreasonable search and seizures. They say that the seizure without notice and an opportunity to be heard prior to seizure constitutes a prior restraint or censorship of the publications and allows the police officers and deputy sheriffs to make a judicial determination after the warrant was issued as to which of the appellants' periodicals and magazines were violative of the obscenity statutes and therefore subject to seizure. The appellants assert that freedom of speech and press occupy a preferred position among our constitutional guarantees, Murdock v. Commonwealth of Pennsylvania, 319 U. S. 105, 63 S. Ct. 870, 87 L. Ed. 1292, and that there is a distinction between a restraint imposed before circulation of a publication and a penalty imposed by reason of its circulation and that prior restraints can be justified only in most 'exceptional cases,' citing Near v. State of Minnesota ex rel. Olson, 283 U. S. 697-716, 51 S. Ct. 625-631, L. Ed. 1357."

The Missouri Supreme Court affirmed (Appendix A, p. 23), holding that "all of the constitutional questions here presented have been resolved adversely to the appellants' contention by **Kingsley Books, Inc., v. Brown,** 354 U. S. 436, 77 S. Ct. 1325, 1 L. Ed. 2d 1469," concluding:

"The differences in the Missouri and New York statutes are in degree and not of kind. The New York statute provides for a hearing within one day after seizure and a decision within two days after hearing; the Missouri statute provides that the hearing shall be not less than five nor more than twenty days after the seizure. This provision may redound to the benefit of the owners of the publications in preparing their cases for trial. There is no complaint in this case that the appellants sought or desired an earlier hearing and it was refused. It has not been demonstrated that the difference in time of hearing is unreasonable. While publications are seized under the Missouri statute, no temporary injunction is issued as under the New York law. The dealers may continue to sell under the Missouri act if they have or can obtain the publications and desire to do so. The contention that the statutes and the Court rule are unconstitutional in the respects asserted is denied."

THE FEDERAL QUESTIONS ARE SUBSTANTIAL.

1. The constitutional limits of prior restraints on publications are substantial questions involved in this appeal. In **Kingsley Books, Inc. v. Brown**, 354 U. S. 326, this Court upheld a limited injunctive remedy against a particular publication under a New York statute which provided "closely defined procedural safeguards against the sale and distribution of written and printed matter found after due trial to be obscene." The New York statute "studiously withholds restraint upon matters not already published and not yet found to be offensive" and permitted the seizure of the printed matter, if found to be obscene, subsequent to trial only. The Missouri statute goes much further. It permits the seizure of publications prior to any determination that they are in fact obscene. In New York a distributor is not restrained from circulating his

publications before a determination that they are offensive, if he chooses to risk punishment for contempt or for violating the criminal laws. Missouri provides no such option. All the copies of a particular publication in a distributor's possession are seized by the police prior to any hearing. The distributor may circulate the publication only if he is financially and otherwise able to secure additional copies. But these also may be summarily seized.

Moreover, the Missouri statute does not confine the seizure to a particularly described publication or to a publication displayed to a court prior to the seizure. It does not narrowly limit what may be seized to a specific publication or to a specific class of publication. Rather it authorizes the seizure of all publications at a certain address which the police officer or sheriff executing the warrants finds fits the general description of "obscene, lewd, licentious * * * books, pamphlets, papers, and other articles of an indecent, immoral and scandalous character".

The object of the statute is "to protect the public from character contamination" by preventing the dissemination of obscenity (Appendix A, p. 23).

The effect of the Missouri provisions is that a state, ex parte, prior to any hearing in order to determine the nature of the publications which a distributor possesses, may obtain possession of his publications and retain these publications until after a hearing determining the obscenity issue.[5] The result is a limitation upon circulation prior to dissemination to the public. When the publications are seized the material contained therein must be reviewed and approved prior to distribution. A distributor of publications should have the right to circulate his material subject to any criminal or contempt sanction if the matter offends any laws governing obscenity.

[5] Such a seizure, applied to a newspaper, would destroy the value of any news items of current significance.

In determining the constitutionality of the procedure authorized by Sections 542.380 and 542.400, R. S. Mo. 1949, the Missouri Supreme Court has misconstrued **Kingsley Books, Inc. v. Brown**, 354 U. S. 436, by finding "all of the constitutional questions here presented have been resolved adversely to appellants' contentions" in **Kingsley** and that the "difference in the Missouri and New York statutes are in degree and not of kind" (Appendix A, p. 24).

We believe that the Missouri procedure and the procedure upheld in **Kingsley** are vastly different in kind and that the distinction between them points out the basic unconstitutionality of the Missouri statute and court rule.

In **Kingsley**, after the complaint was issued, the petitioners were ordered to show cause within four days why they should not be enjoined pendente lite from distributing the books. Petitioners then consented to the granting of an injunction pendente lite. This court was careful to point out in that case that the issue was whether the chief executive of a municipality could institute a suit for an injunction to prevent the distribution of publications "under closely defined procedural safeguards," and to obtain an order for their seizure, in default of surrender, of the publications if after the trial the publications were found to be obscene. Until a publication is declared obscene by a New York Court, the owner of a publication in New York may keep the periodical and sell it on his own judgment and at his own risk. The material alleged to be obscene may not be seized before a hearing for the determination of the obscenity issue. This is the vast difference between the procedure approved in **Kingsley** and that approved by the Missouri Supreme Court. In Missouri police officers are permitted to seize publications prior to any hearing or judicial determination that the seized items are obscene. The owner of the property is not given any choice as to whether he will continue to circulate the material or withdraw it. Rather the circulation is summarily

curtailed by police officers without notice or an opportunity to be heard and prior to any judicial determination as to the character of the material. Thus, the number of days between the institution of the proceeding in New York and the hearing (without an intervening seizure) is in no sense material in comparing that statute with the number of days provided in Missouri after seizure and the subsequent court hearing. There is a curtailment in circulation in Missouri prior to any judicial determination of the character of the publication. The administrative censor is allowed to curtail circulation prior to approval. The number of days so intervening is meaningless because the unilateral seizure has already been accomplished.

Even if a seizure of alleged obscene publications prior to a hearing would be permissible, the clean sweep seizure authorized by this statute would violate the constitutional guaranties of free speech and press. The description in the warrants of the matters to be seized as merely "obscene, lewd, licentious * * * books, pamphlets, papers, and other articles or publications of an indecent, immoral and scandalous character" gave too much authority to the executing officers. Police or any other executive censor should not be allowed to seize all material from a magazine or book seller which they determine falls within a general warrant allowing the seizure of all obscene material. Especially is this so when the magazines or books have been openly displayed for sale and may be described by name, volume or issue. The approval of such a procedure will only restrict the circulation of all writings. The whim and taste of every minor official should not be the basis for the curtailment of a publication. This procedure will certainly lead to a restriction of the communication of ideas of all kind and nature.

The application of the constitutional test of obscenity is a task of great magnitude. The determination of whether a book, as a whole, has "a substantial tendency to deprave

or corrupt its readers by inciting lascivious thoughts arousing lustful desires," or whether a book is "calculated" to corrupt or debauch, or whether "to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interests." **Roth v. United States and Alberts v. California**, 354 U. S. 476, 486, 489, 495, is a perplexing and baffling problem sometimes unsolved until the court of last resort has spoken. Sex and the portrayal of sex is not synonymous with obscenity but only material dealing with sex in a manner appealing to prurient interests is obscene. 354 U. S. at 487. Furthermore, obscenity cannot be determined solely from the nature of the material but the question of customary freedom of expression has to be considered. A publication must be tested by contemporary community standards. And obscenity is not as "distinct, recognizable, and classifiable as poison ivy."

Moreover it is unreasonable to attempt to place statutes dealing with alleged obscene publications on the same footing as statutes directed generally against gambling and intoxicating liquor. The constitutional guaranties of freedom of speech and of the press stand in the way of allowing publications to be seized in like manner. And there is no specific constitutional inhibition applicable to gambling equipment or intoxicating liquor. Yet the conclusion of the court below was that books, pamphlets, magazines and all writings can be regulated by a State like gambling equipment and intoxicating liquor. Indeed, the Court states in regard to obscenity that, "Its dissemination should be prevented just as certainly as the spread of disease germs should be curbed among the members of the community. The Courts have never hesitated to enjoin potential menaces to public health or to approve the vaccination or innoculation of school children and others when reasonably required. Obviously, a State government does not have to permit the home of its

citizens to be destroyed by fire when the arson can be reasonably prevented * * *" (Appendix A, p. 23). This ignores the admonition of Mr. Justice Douglas in **Kingsley Books, Inc. v. Brown**, 354 U. S. 436, 447, that "Free speech is not to be regulated like diseased cattle and impure butter."

The reasoning of **Smith v. California**, 361 U. S. 147, supports the contentions here urged. This court, while recognizing that a state may eliminate scienter in other areas of its criminal law such as in its intoxicating liquor or food and drugs statutes, held that it could not be eliminated in an ordinance making possession of an obscene book unlawful. The First Amendment free speech provision prohibited such a restriction. Similarly, the regulation of intoxicating liquor and food and drugs permit summary seizure. But where the First Amendment is involved such summary procedure may not be constitutionally authorized.

Nor can a statute or rule which in operation and effect substantially eliminates or tends to diminish the flow of free expression be justified by recourse to the label of police powers.[6]

In this appeal the validity of the cited Missouri statutes under the free speech and press provisions of the federal constitution were raised in the courts below. The ruling of the Missouri Supreme Court was that the statutes were not repugnant to the constitution. Accordingly, this court has jurisdiction to hear this case under the provisions of 28 U. S. C. 1257 (2).

2. The opinion of the trial judge shows that he applied unconstitutional tests of obscenity. He applied the test of whether the publication might incite lascivious

[6] *Thornhill v. Alabama*, 310 U. S. 88; *Bridges v. California*, 314 U. S. 252; *Laxton v. Steele*, 152 U. S. 133, 137.

thoughts "of those whose minds are open to such influences and into those hands such a publication may fall" and whether the publications "would arouse lewd or lascivious thoughts in the susceptible, Appendix A, pp. 37-38. The trial judge disregarded the "dominant theme of the material." **Roth v. United States**, 354 U. S. 476, 489. No finding was made that the predominant appeal of the publications considered as a whole was to prurient interests, or that the book had a substantial tendency to corrupt or deprave the average person. 354 U. S. at 487. On the contrary the explicit view of the trial Court was that the book would tend to deprave those who were susceptible. The trial Court also did not apply contemporary community standards as a test for obscenity, 354 U. S. at 489, and excluded from consideration whether each publication "goes substantially beyond customary limits of candor, description or representation", 354 U. S. at 487, fn. 20.

On review, the appellate court never met the issue as to whether the publications were obscene under the constitutional test. On the one hand, it held that it was not bound by the trial judge's opinion and, on the other hand, it concluded that the judgment of the lower Court was not "clearly erroneous." As a result, the Missouri Supreme Court did not squarely meet the issue as to whether the test applied to the publications was a proper one in view of **Roth v. United States** and **Alberts v. California**, 354 U. S. 476. The result of the trial and appellate courts' opinions is that the correct test of obscenity is never applied to the publications in this case. To hold that the appellate court is not bound by such findings and conclusions, and that the trial judge's decision is not clearly erroneous does not constitute a review of the alleged obscenity of the material in question by a proper standard, as set out in **Roth v. United States**, 354 U. S. 476, and thereby impairs appellants' freedom of speech.

The decision of the Supreme Court of Missouri failed to apply properly the free speech and press guaranties of the First and Fourteenth Amendments. We believe that the questions presented by this appeal are substantial and that they are of public importance.

Respectfully submitted,

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APPENDIX A.

Opinions.

In the Supreme Court of Missouri
En Banc.

In Re: Search Warrant of Property at 5 West 12th Street, Kansas City, Missouri, v. William Marcus and Title News Company.	No. 46,900
In Re: Search Warrant of Property at 3105 Euclid, Kansas City, Missouri, v. Jack K. Rayburn and Ted's News Shop.	No. 46,901
In Re: Search Warrant of Property at 1 East 39th Street, Kansas City, Missouri, v. Harvey Hammer and Town Book Store.	No. 46,902
In Re: Search Warrant of Property at 123 East 12th Street, Kansas City, Missouri, v. Harvey Hammer and Ruback's News Stand.	No. 46,903

In Re: Search Warrant of Property at 104 East 10th Street, Kansas City, Missouri, v. Homer Smay and Kansas City News Distributors.	No. 46,904
In Re: Search Warrant of Property at 221 East 12th Street, Kansas City, Missouri, v. Jack Gordon.	No. 46,905

Appeal From the Circuit Court
of Jackson County,
Honorable Ben Terte, Judge.

These appeals are from proceedings under §§ 542.380-542.420 which provide for the seizure of publications alleged to be obscene and authorize their destruction if, after a hearing, they are in fact found to be obscene. Six search warrants were obtained on October 10, 1957, from the Circuit Court of Jackson County by an officer of the Police Department of Kansas City. One of them was directed against the premises of a business wholesaling newspapers, books and magazines; the remaining five warrants were for premises on which were conducted displays and sales of such publications at retail.

The search warrants were executed on the same day and the returns were filed in court together with an inventory of the publications seized. A copy of the inventory was left with the persons in charge of the premises where the seizure was made. Notices were served upon the interested parties of a hearing to be held in the circuit court to determine whether the property seized constituted ob-

scene, lewd, licentious, indecent, or lascivious material within the meaning of § 542.380 and whether it was subject to destruction pursuant to § 542.420. The claimants of the publications seized filed separate motions for the immediate return of the property seized and to quash the search warrant and a hearing of all issues was had before the trial court sitting without a jury.

By its judgment the trial court overruled the motions to quash the search warrants and found that 100 of the 280 publications in evidence were in violation of the Obscenity Statute, § 542.380. The remaining 180 publications and all copies thereof were ordered to be returned to the claimants. After unavailing motions for new trials, the claimants appealed. The appeals all present the same questions and have been consolidated.

This court has appellate jurisdiction because constitutional questions have been timely and properly presented. Art. V, Sec. 3, Constitution of Missouri 1945; State v. Becker, 364 Mo. 1079, 272 S. W. 2d 283.

Section 542.380 deals with the means of determining whether certain property, including publications alleged to be obscene, are of the kind prohibited by law and, insofar as here material, provides that upon a verified complaint a search warrant may be issued to a sheriff or any constable of the county directing him to search for and seize: "(2) Any of the following articles, kept for the purpose of being sold, published, exhibited, given away or otherwise distributed or circulated, viz.: obscene, lewd, licentious, indecent or lascivious books, pamphlets, ballads, papers, drawings, lithographs, engravings, pictures, models, casts, prints or other articles or publications of an indecent, immoral or scandalous character, or any letters, handbills, cards, circulars, books, pamphlets or advertisements or notices of any kind giving information, directly

or indirectly, when, where, how or of whom any of such things can be obtained; * * *."

Section 542.400 provides that the judicial officer issuing the warrant shall set a day not less than five nor more than twenty days after the date of service and seizure, "for determining whether such property is the kind of property mentioned in section 542.380, and shall order the officer having such property in charge to retain possession of the same until after such hearing." The section further provides for posting a written notice of the hearing on the premises where the property was seized and for delivering a copy of such notice to any person claiming an interest in such property. Section 542.420 authorizes the destruction of the property or articles if they are found to be of the kind mentioned in § 542.380 (2).

Supreme Court Rule 33 and particularly 33.01, dealing with procedural aspects of searches and seizures, provides, inter alia, for the seizure of personal property where authorized by statute if the verified complaint filed with the judge or magistrate states facts positively and not upon information and belief.

The appellants charge that these statutes and the court rule are violative of their constitutional rights of freedom of speech and press guaranteed by Art. I, Sec. 8, Constitution of Missouri, 1945, and Amendment I of the United States Constitution as made applicable by the privileges and immunities and due process clauses of the Fourteenth Amendment of the United States Constitution, and guaranteed by the provisions of Art. I, Sec. 15 of the Missouri Constitution protecting them against unreasonable search and seizures. They say that the seizure without notice and an opportunity to be heard prior to seizure constitutes a prior restraint or censorship of the publications and allows the police officers and deputy sheriffs

to make a judicial determination after the warrant was issued as to which of the appellants' periodicals and magazines were violative of the obscenity statutes and therefore subject to seizure. The appellants assert that freedom of speech and press occupy a preferred position among our constitutional guarantees, Murdock v. Pennsylvania, 319 U. S. 105, 63 S. Ct. 870, 87 L. Ed. 1292, and that there is a distinction between a restraint imposed before circulation of a publication and a penalty imposed by reason of its circulation and that prior restraints can be justified only in most "exceptional cases," citing Near v. Minnesota ex rel. Olson, 283 U. S. 697-716, 51 S. Ct. 625-631, 75 L. Ed 1357.

Conceding this much to be true, it must also be recognized as stated in Near v. Minnesota, supra, that "the authority of the state to enact laws to promote the health, safety, morals, and general welfare of its people is necessarily admitted", 51 S. Ct. 628; that "the protection even as to previous restraint is not absolutely unlimited", and that "the primary requirements of decency may be enforced against obscene publications." 51 S. Ct. 631. Also, in Roth v. United States, 354 U. S. 476, 485, 77 S. Ct. 1304, 1309, the Supreme Court held "that obscenity is not within the area of constitutionally protected speech or press." In State v. Becker, 364 Mo. 1079, 272 S. W. 2d 283, 288-9, this court held: "It has been long held that the right of freedom of speech is subject to the state's right to exercise its inherent police power. The right of free speech is not an absolute right at all times and under all circumstances." The constitutionality of the penal obscenity statute, § 563.280, was attacked in the Becker case and it was held, inter alia, not to impair the constitutional guarantees of freedom of speech and press.

We cannot accept the appellants' contention that: "The possessor of publications should have the right to circu-

late his material subject to any criminal or other sanctions if the matter offends any governing obscenity such as Section 563.280, R. S. Mo. 1949."[1] Relegating the state to punishment of the fait accompli would overlook and neglect entirely government's right and duty to protect the public from character contamination and its unfortunate consequences. If obscenity is as destructive and weakening to the moral fiber as the federal and state governments have always considered it, then its dissemination should be prevented just as certainly as the spread of disease germs should be curbed among the members of a community. The courts have never hesitated to enjoin potential menaces to public health or to approve the vaccination or innoculation of school children and others when reasonably required. Obviously, a state government does not have to permit the homes of its citizens to be destroyed by fire when the arson can be reasonably prevented. The contention stated has been decided adversely to the appellants in the Becker case, supra, as well as the Kingsley case which we shall now consider.

All of the constitutional questions here presented have been resolved adversely to the appellants' contention by Kingsley Books, Inc., v. Brown, 354 U. S. 436, 77 S. Ct. 1325; 1 L. Ed. 2d 1469. This was a proceeding under the New York statute which is similar to that of Missouri. The New York act provided that upon a complaint being filed the issuance of a temporary injunction against the circulation of publications alleged to be obscene was au-

[1] Section 563.280, insofar as here pertinent, provides: "Every person who shall manufacture, print, publish, buy, sell, offer for sale, or advertise for sale, or have in his possession, with intent to sell or circulate, or shall give away, distribute or circulate any obscene, lewd, licentious, indecent or lascivious book, pamphlet, paper, ballad, drawing, lithograph, engraving, picture, photograph, model, cast, print, article or other publication of indecent, immoral or scandalous character, * * * shall, on conviction thereof, be fined not more than one thousand dollars nor less than fifty dollars or be imprisoned not more than one year in the county jail, or both; * * *."

thorized. If the court found the material to be obscene, a permanent injunction against its distribution could be issued and an order made for the destruction of the material. The Supreme Court of the United States held that the New York statute was not unconstitutional. It was held, 77 S. Ct. 1328 (6), that the Fourteenth Amendment did not restrict the states to the use of criminal processes in seeking to protect its people of dissemination of pornography. The New York statute was held not to amount to prior censorship of literary products and not to violate the freedom of thought and speech protected by the Fourteenth Amendment.

The differences in the Missouri and New York statutes are in degree and not of kind. The New York statute provides for a hearing within one day after seizure and a decision within two days after hearing; the Missouri statute provides that the hearing shall be not less than five nor more than twenty days after the seizure. This provision may redound to the benefit of the owners of the publications in preparing their cases for trial. There is no complaint in this case that the appellants sought or desired an earlier hearing and it was refused. It has not been demonstrated that the difference in time of hearing is unreasonable. While publications are seized under the Missouri statute, no temporary injunction is issued as under the New York law. The dealers may continue to sell under the Missouri act if they have or can obtain the publications and desire to do so. The contention that the statutes and the Court rule are unconstitutional in the respects asserted is denied.

Apart from the judgment formally entered, the trial court filed in the office of the clerk of the circuit court a memorandum entitled "Opinion" in which the court, inter alia, set out the applicable statutes and, in connection with the test for determining whether the publications

were obscene, lewd, lascivious, licentious, indecent and of an immoral character, cited and quoted from State v. Mac Sales Company, Mo. App., 263 S. W. 2d 860, 863, State v. Pfenninger, 76 Mo. App. 313, 317, and State v. Becker, 346 Mo. 1079, 272 S. W. 2d 283, 287. The appellants assert that the trial court applied the tests and standards of obscenity stated in those cases and that such tests and standards are violative of their rights of freedom of speech and press under the federal and state constitutions by virtue of the standards adopted by the Supreme Court of the United States in Roth v. United States and Alberts v. California, 354 U. S. 476, 77 S. Ct. 1304, 1 L. Ed. 1498, and Butler v. Michigan, 352 U. S. 380, 77 S. Ct. 524, 1 L. Ed. 2d 412. It should be noted that the trial court's opinion states and **the judgment holds** that the 100 exhibits listed were obscene, lewd, licentious, lascivious, indecent and of an immoral and scandalous character "within the meaning and intent of **Missouri Revised Statutes, 1949, Section 542.380.**"

The appellants are mistaken in their view of the holding of the Becker case which is controlling and the only one we need to discuss. They say the standard adopted was the effect of isolated portions of the publication upon particularly susceptible persons which has been construed to be the rule announced in Regina v. Hicklin, 1868, L. R. 3 Q. B. 360, one of the authorities discussed in Becker. Regardless of the present validity of the Hicklin rule, that was not the standard applied in the Becker case. In announcing the mode of determination the court stated, 272 S. W. 2d 286: "These questions have been considered and tested objectively as to the effect of these publications in their entirety upon persons of average human instincts." In this interpretation of Becker, this court is fortified by the opinion of the Supreme Court of the United States. In the Roth and Alberts case, the Becker case is listed as one of the decisions which has rejected

the Hicklin test and substituted this standard: "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest." 354 U. S. 489, marginal note 26. Appellants' claim of error is denied.

Moreover, appellate review in a nonjury case is upon both the law and the evidence, as in actions of an equitable nature, and a trial court's memorandum or written opinion is not binding and preclusive even if deemed a statement of grounds of decision. Grapette Co. v. Grapette Bottling Co., Mo. App., 286 S. W. 2d 34, 36; Fort Osage Drainage District of Jackson County v. Jackson County, Mo., 275 S. W. 2d 326, 328; Hammond v. Crown Coach Co., 364 Mo. 508, 263 S. W. 2d 362, 366; Hilmer v. Decher, Mo. App., 183 S. W. 2d 321, 326; § 510.310-2.

The appellants next contend that the complaints and the search warrants based thereon violated the search and seizure provisions of the Missouri Constitution, Art. I, Sec. 15, and Supreme Court Rule 33.01 (b) in that (1) they did not describe the publications "to be searched for and seized in sufficient detail, and in particularity, to enable the person serving the warrant to readily ascertain and identify the same" and (2) the warrants were issued without a sufficient showing of probable cause. Both the complaints and the search warrants described the publications in the language of the statute, § 542.380 (2). The constitution protects against "unreasonable searches and seizures" and provides that no search warrant "shall issue without describing the place to be searched, or the person or thing to be seized, as nearly as may be; nor without probable cause * * *." Rule 33.01 (b) provides that the search warrant must describe the place and property "in sufficient detail and particularity to enable the officer serving the warrant to readily ascertain and identify the same."

It is **unreasonable** searches and seizures that are prohibited by the constitution, so the determination must be whether the description of the publications was reasonably definite and particular considering the nature and character of the property involved. The proceedings under these statutes are essentially proceedings in rem having for their purpose the seizure and destruction of obscene material, gambling equipment and devices and the other prohibited property mentioned in § 542.380. The general rule distinguishing the particularization of property description required in this class of cases is well stated in 79 C. J. S. 861, Searches and Seizures, § 73f, as follows: "**Specific property; property of specified character.** Where the purpose of the search is to find specific property, it should be so particularly described as to preclude the possibility of seizing any other; but, if the purpose is to seize, not specified property, but property of a specified character, which, by reason of its character and of the place where, and the circumstances under which, it may be found, if found at all, would be illicit, a description would be unnecessary and, ordinarily, impossible, except as to such character, place and circumstances."

In 47 Am. Jur. 524, Searches and Seizures, § 37, there is this further statement: "A description of the property to be seized need not be technically accurate nor necessarily precise; and its nature will necessarily vary according to whether the identity of the property, or its character, is the matter of concern. Further, the description is required to be specific only so far as the circumstances will ordinarily allow. Thus, under a statute authorizing searches for gaming apparatus or implements, it is not sufficient to describe the property as goods, wares, and merchandise, or as chattels generally; but a search warrant commanding the seizure of 'gambling implements and apparatus used, kept, and provided to be used in unlawful gambling' on certain premises and in a certain building,

is sufficiently definite. So, in the case of warrants to search for smuggled goods or for lottery tickets, a general description is deemed sufficient."

In State v. Cook, 322 Mo. 1203, 18 S. W. 2d 58, a search warrant requiring the officers to seize "all intoxicating liquors" found on the premises was held sufficiently definite and not to deprive the defendant of his "right to a trial by jury on the issue of the intoxicating character of the liquor seized." In North v. State, 159 Fla. 854, 32 So. 2d 915, a warrant describing the property as "gambling implements and devices used for the purpose of gaming and gambling" was held sufficient. In Cagle v. State, 147 Tex. Cr. 354, 180 S. W. 2d 928, a warrant describing the property as implements being kept for: "The establishment and operation of a lottery, and the keeping and exhibiting of a policy game" was held sufficient to justify the seizure of a variety of things used in conducting a policy game. In Frost v. People, 193 Ill. 635, 61 N. E. 1054, a warrant describing the property as "gaming instruments and apparatus" was held sufficient.

In the circumstances of this case we hold the search and seizure was not unreasonable for lack of a sufficient description of the property to be seized.

With respect to probable cause, the separate complaints or applications for the search warrants, which were sworn to by a lieutenant of the Kansas City Police Department, were presented to the Circuit Court by the police lieutenant and an assistant prosecutor of Jackson County. The complainant swore to the facts "of his own knowledge" and the court made a finding that there was probable cause to believe the allegations of the complaint to be true and that there was probable cause for the issuance of the search warrants. Supreme Court Rule 33.01 further defines the statutory procedure and provides that the judicial officer shall issue the warrant if the complaint is veri-

fied and supported by affidavits "stating evidential facts from which such judge or magistrate determines the existence of probable cause", but it also authorizes the issuance of the warrant if complaint states the facts "positively and not upon information and belief" as was done in this case. We deem the factual allegations sufficient to support the finding of probable cause and the assignment of error is denied.

The search warrants were directed "to any peace officer in the state of Missouri." The appellants assert that this was improper and violative of their rights under Art. I, Sec. 15, of the Missouri Constitution and Supreme Court Rule 33.01 in that the warrants were not directed to a particular peace officer or officers by name. The constitution does not specify to whom a search warrant shall be addressed and § 542.380 provides that the judicial officer shall issue the warrant "to the sheriff or any constable of the county." Rule 33.01 provides the judge or magistrate shall issue the search warrant "directed to any peace officer." Rule 33.02 provides: "Every such search warrant shall be executed by a peace officer and not by any other person." Section 542.290 provides: "Every such [search] warrant shall be executed by a public officer, and not by any other person."

In this regard the appellants rely upon United States v. Kohlman, 51 F. 2d 313, which involved a federal search warrant in a prohibition case. It was held that a search warrant should be directed to a person or persons by name and not to a class and that it could only be executed in accordance with Title 11, Sec. 7, of the Espionage Act which provided that a federal search warrant may be served "by any of the officers mentioned in its direction, but by no other person, except in aid of the officer on his requiring it." 40 Stat. 229. Obviously, neither the statute nor the decision is controlling in this matter of state law.

The appellants make no contention that the warrants were served by any one without authority, but simply that the warrant was "improper on its face." The record shows the warrants were executed by deputy sheriffs of Jackson County, together with officers of the Kansas City Police Department. We find no merit in appellants' contention and it is denied.

The appellants' remaining assignment is that the trial court erred in finding that the publications in question are obscene, lewd, licentious, indecent, lascivious, immoral and scandalous within the meaning and intent of § 542.380. As we have previously pointed out the Missouri rule as applied in the Becker case is in accord with the standard approved by the Supreme Court of the United States in the Roth and Alberts case, which is: "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest." 354 U. S. 489. We have also held that the trial court's opinion or memorandum cannot be used to contradict the judgment formally entered even if it were inconsistent with the judgment; however, we do not so construe it.

It is impossible to adequately describe these exhibits and quite unnecessary. It is sufficient to say of them generally that they consist of pictures of young women, naked or nearly so, in suggestive and provocative poses with emphasis on bust development and lustful entreaty. The legends accompanying the pictures and other printed material add to the prurient interest created. It is stated on some of the publications that they are for artists and photographers or for some legitimate purpose and restricted use. However, the dominant character of the publications and the place and manner in which they were exposed for sale belie this thin disguise. Generally, the technical information on picture taking in these publica-

tions is less than that found on the leaflet in a roll of new film or in the pamphlet that accompanies the purchase of a modest camera. No one can seriously contend that any great work of art, literature, ideas or information will be lost to the world if these publications are not disseminated.

Our review of the evidence in cases tried upon the facts without a jury is "as in suits of an equitable nature" and the "judgment shall not be set aside unless clearly erroneous." Section 510.310-4. We have examined the exhibits and applied the tests approved in the Becker and Roth cases. While opinions may vary with regard to the proper classification of publications in that penumbral area between art and pornography, we do not find the judgment of the trial court to be "clearly erroneous" in any respect.

Accordingly the judgment is affirmed.

Clem F. Storckman, Presiding Judge.

Eager, J., & Broaddus, Sp. J., concur.

In the Supreme Court of Missouri,
En Banc.

In Re: Search Warrant of Property at 5 West 12th Street, Kansas City, Missouri, v. William Marcus et al.	No. 46,900-46,965

Per Curiam.

In their supplemental brief filed for the hearing before the court en banc the appellants in their points relied on make this additional contention:

"The divisional opinion holding the warrants to sufficiently describe the items to be seized is erroneous in condoning the issuance of a general warrant for the seizure of publications and thereby violates appellants' freedom of speech and press under the First Amendment to the Constitution of the United States and deprives them of their property without due process of law and their privileges and immunities as citizens as guaranteed by the due process and privileges and immunities clause of Amendment Fourteen of the United States Constitution."

This adds nothing to the scope of the contentions previously made and disposed of in the divisional opinion.

Appellants also cite Smith v. California, ... U. S. ..., 80 S. Ct. 215, 4 L. Ed. 2d 205, decided since the decision in division. In the Smith case an ordinance which had the effect of imposing a strict criminal liability upon a bookseller possessing an obscene book without a showing that he had knowledge of its contents was struck down as infringing upon constitutional rights. This is not a criminal proceeding and a lack of guilty knowledge is not claimed. Our attention is also called to Kingsley International Picture Corp. v. Regents of the University of the State of New York, 360 U. S. 684, 79 S. Ct. 1362, 3 L. Ed. 2d 1512. Neither these nor the other cases cited repudiate previous holdings of the Supreme Court of the United States that obscene material is not within the protection of the constitutional guarantees of freedom of speech and the press. Roth v. United States, 354 U. S. 476, 77 S. Ct. 1304, 1 L. Ed. 2d 1498. In fact the Smith case reaffirms that proposition. Thus the purpose of the Missouri statute is not unlawful and we hold the procedures employed are in compliance with due process of law and not violative of other constitutional rights. The divisional opinion correctly rules the contentions made.

In the Circuit Court of Jackson County,
Missouri, at Kansas City,
Division No. 9.

In re: Search Warrant of Property at 3105 Euclid, Kansas City, Missouri.	
In re: Search Warrant of Property at 5 West 12th Street, Kansas City, Missouri.	
In re: Search Warrant of Property at 1 East 39th Street, Kansas City, Missouri.	No. .....
In re: Search Warrant of Property at 221 East 12th Street, Kansas City, Missouri.	
In re: Search Warrant of Property at 123 East 12th Street, Kansas City, Missouri.	
In re: Search Warrant of Property at 104 East 10th Street, Kansas City, Missouri.	

Opinion.

On October 10, 1957, pursuant to search warrants issued by this court under Section 542.380 of the Revised Statutes of Missouri 1949, the Jackson County Sheriff's Office and the Kansas City, Missouri, Police Department seized certain books, magazines and other printed matter, in the possession of a wholesale distributing company, located at 3105 Euclid Avenue, and in the possession of certain retailers located at 5 West 12th Street, 1 East 39th Street, 221 East 12th Street, 123 East 12th Street and 104 East 10th Street, all located in Kansas City, Jackson County, Missouri.

Pursuant to notices duly posted, as provided for in Section 542.400, Revised Statutes of Missouri 1949, the owners of said property appeared by attorneys, and a hearing, pursuant to Section 542.410, Revised Statutes of Missouri 1949, was held on the 23d day of October, 1957.

The following motions, and each of them, having been presented to the Court, after due consideration, are overruled:

a. Amended Motion of Ted's News Shop and Jack K. Rayburn for Immediate Return of Property Seized and to Quash Search Warrant.

b. Motion of Jack Gordon for Immediate Return of Property Seized and to Quash Search Warrant.

c. Amended Motion of Title News Company and William Marcus for Immediate Return of Property Seized and to Quash Search Warrant.

d. Amended Motion of Town Book Store and Harvey Hammer for Immediate Return of Property Seized and to Quash Search Warrant.

e. Amended Motion of Ruback's News Stand and Harvey Hammer for Immediate Return of Property Seized and to Quash Search Warrant.

f. Amended Motion of Kansas City Distributors and Homer Smay for Immediate Return of Property Seized and to Quash Search Warrant.

Periodicals, books, magazines and other printed matter were introduced in evidence as exhibits and it was stipulated by the parties that the same were kept for the purpose of public sale, distribution and circulation. The court has read and studied each of the exhibits so introduced.

Statutes Applicable.

The statutes applicable to the facts in this cause are as follows, to-wit: Section 542.380, Revised Statutes of Missouri, reads as follows:

"Upon complaint being made, on oath, in writing, to any officer authorized to issue process for the apprehension of offenders, that any of the property or articles herein named are kept within the county of such officer, if he shall be satisfied that there is reasonable ground for such complaint, shall issue a warrant to the sheriff or any constable of the county, directing him to search for and seize any of the following property or articles:" . . . .

"(2) Any of the following articles, kept for the purpose of being sold, published, exhibited, given away or otherwise distributed or circulated, viz.: obscene, lewd, licentious, indecent or lascivious books, pamphlets, ballads, papers, drawings, lithographs, engravings, pictures, models, casts, prints or other articles or publications of an indecent, immoral or scandalous character, or any letters, handbills, cards, circulars, books, pamphlets or advertisements or notices of any kind giving information, directly or indirectly, when, where, how or of whom any of such things can be obtained;" . . .

542.420. Disposition of Property.

"If the judge or magistrate hearing such cause shall determine that the property or articles are of the kind mentioned in Section 542.380, he shall cause the same to be publicly destroyed, by burning or otherwise, and if he find that such property is not of the kind mentioned, he shall order the same returned to its owner. If it appear that it may be necessary to use such articles or property as evidence in any criminal prosecution, the judge or magistrate shall order the officer having possession of them to retain such possession until such necessity no longer exists, and they shall neither be destroyed nor returned to the owner until they are no longer needed as such evidence."

The Question to Be Determined by the Court.

Were any or all of the publications and printed matter seized kept for the purpose of being sold, published, exhibited, given away, distributed or circulated, obscene, lewd, lascivious, indecent, or of an immoral or scandalous character?

Our courts have many times stated the test for determining obscenity in matters such as those before the court. Thus in the case of State v. Mac Sales Company, Mo. App., 263 S. W. 2d 860, l. c. 863, the St. Louis Court of Appeals said:

> "With reference to (4), supra, one test of obscenity is whether the article in question tends to deprave and corrupt the morals by inciting lascivious thoughts or arousing the lustful desire of those whose minds are open to such influences and into whose hands such a publication may fall." * * *

Again, in the case of State v. Pfenninger, 76 Mo. App. 313, the Court described obscenity as follows:

> "Obscenity is such indecency as is calculated to promote the violation of the law and the general corruption of morals. It is applied to language spoken, written or printed, and to pictorial productions and include what is foul and indecent, as well as immodest, or calculated to excite impure desires."

The Supreme Court of Missouri, in the case of State v. Becker, 272 S. W., page 282, decided October 11, 1954, speaking through Judge Conkling, said:

> "The words 'indecent, immoral or scandalous' as used in this statute, and particularly as used therein in connection with the words 'obscene, lewd, licentious and lascivious,' are not words of hidden or obscure or uncertain meaning. Those words are not technical

terms of the law. The word 'indecent' is a common word of common understanding. It has been defined to mean unfit to be seen or heard; immodest; gross, obscene; offending against modesty and less than immodest; that which would arouse lewd or lascivious thoughts in the susceptible."

Again the test of obscenity is set forth in 67 C. J. as follows:

"The words of the statute 'obscene, lewd, licentious, indecent, lascivious, immoral, scandalous' are used therein as descriptive of the character of the publication prohibited to be possessed with intent to sell or circulate, are all synonymous and of similar meaning. Those descriptive words are neither vague nor indefinite. They are words of common usage and understanding, and as used in this statute, and in law, they have a meaning understood by all."

After thoroughly studying the exhibits heretofore referred to, and in the light of the tests laid down by the courts of this State, I am of the opinion that the exhibits described in Schedule "A," which is attached hereto and made a part hereof, are obscene, lewd, licentious, lascivious, indecent and of an immoral and scandalous character within the meaning and intent of the Missouri Revised Statutes 1949, Section 542.380.

It is therefore the order of this court that the above-numbered exhibits, described in Schedule "A" attached hereto, and copies of said exhibits, all in the possession of the Sheriff of Jackson County, shall be retained by said officer, as necessary evidence for the purpose of possible criminal prosecutions, and when such necessity no longer exists that said exhibits, and copies thereof, be then publicly destroyed by burning or otherwise, as provided for by law.

The Court further orders that all exhibits set forth in Schedule "B," which is attached hereto and made a part hereof, and copies of said exhibits, all in the possession of said Sheriff of Jackson County, Missouri, be returned to the owners thereof.

A Judgment has been entered this day in conformity with the views expressed herein.

Ben Terte,
Judge.

Dated this 12th day of December, 1957.

Judgment of Missouri Supreme Court.

And on the 14th day of March, 1960, the following judgment was entered in said cause, to-wit:

(Caption omitted.)

Now at this day come again the parties aforesaid, by their respective attorneys, and the Court here being now sufficiently advised of and concerning the premises, doth consider and adjudge that the judgment aforesaid, in form aforesaid, by the said Circuit Court of Jackson County rendered, be in all things affirmed, and stand in full force and effect; and that the said respondents recover against the said appellants their costs and charges herein expended and have therefor execution (Opinion filed).

APPENDIX B.

Chapter 542.

Missouri Revised Statutes 1949.

* * * * * * * *

Section 542.380. Upon complaint being made, on oath, in writing, to any officer authorized to issue process for the apprehension of offenders, that any of the property or articles herein named are kept within the county of such officer, if he shall be satisfied that there is reasonable ground for such complaint, shall issue a warrant to the sheriff or any constable of the county, directing him to search for and seize any of the following property or articles:

* * * * * * * *

(2) Any of the following articles, kept for the purpose of being sold, published, exhibited, given away or otherwise distributed or circulated, viz.: obscene, lewd, licentious, indecent or lascivious books, pamphlets, ballads, papers, drawings, lithographs, engravings, pictures, models, casts, prints or other articles or publications of an indecent, immoral or scandalous character, or any letter, handbills, cards, circulars, books, pamphlets or advertisements or notices of any kind giving information, directly or indirectly, when, where, how or of whom any of such things can be obtained.

* * * * * * * *

Section 542.390. Warrant shall describe place and articles to be seized or searched for—power of officer.—Such search warrants shall describe the place to be searched or the things to be seized, as nearly as may be, and shall direct the officer serving the same to seize such articles and bring them before the judge or magistrate issuing the warrant. The officer who shall be charged with the

execution of any warrant specified in sections 542.380 and 542.390 shall have power, if necessary, to break open doors for the purpose of executing the said warrant, and for that purpose may summon to his aid the power of the county.

Section 542.400. Defendant to have notice of date of hearing.—The judge or magistrate issuing the warrant shall set a day, not less than five days nor more than twenty days after the date of such service and seizure, for determining whether such property is the kind of property mentioned in section 542.380, and shall order the officer having such property in charge to retain possession of the same until after such hearing. Written notice of the date and place of such hearing shall be given, at least five days before such date, by posting a copy of such notice in a conspicuous place upon the premises in which such property is seized and by delivering a copy of such notice to any person claiming an interest in such property, whose name may be known to the person making the complaint or to the officer issuing or serving such warrant, or leaving the same at the usual place of abode of such person with any member of his family or household above the age of fifteen years. Such notice shall be signed by the magistrate or judge or by the clerk of the court of such judge.

Section 542.410. Rights of property owners.—The owner or owners of such property may appear at such hearing and defend against the charges as to the nature and use of the property so seized, and such judge or magistrate shall determine, from the evidence produced at such hearing, whether the property is the kind of property mentioned in section 542.380.

Section 542.420. Disposition of property.—If the judge or magistrate hearing such cause shall determine that the

property or articles are of the kind mentioned in section 542.380, he shall cause the same to be publicly destroyed, by burning or otherwise, and if he find that such property is not of the kind mentioned, he shall order the same returned to its owner. If it appear that it may be necessary to use such articles or property as evidence in any criminal prosecution, the judge or magistrate shall order the officer having possession of them to retain such possession until such necessity no longer exists, and they shall neither be destroyed nor returned to the owner until they are no longer needed as such evidence.

Missouri Supreme Court Rules.

Rules of Criminal Procedure.

Rule 33.

Searches and Seizures.

Rule 33.01.—Searches and Seizures—Complaint—Search Warrant—Description of Property and Place. (a) If a complaint in writing be filed with the judge or magistrate of any court having original jurisdiction to try criminal offenses stating that personal property (1) which has been stolen or embezzled, or (2) the seizure of which under search warrant is now or may hereafter be authorized by any statute of this State, is being held or kept at any place, or in any building, boat, vessel, car, train, wagon, aircraft, motor vehicle or other vehicle or upon any person within the territorial jurisdiction of such judge or magistrate, and if such complaint be verified by the oath or affirmation of the complainant and states such facts positively and not upon information or belief; or if the same be supported by written affidavits verified by oath or affirmation stating evidential facts from which such judge or magistrate shall issue a search warrant directed

to any peace officer commanding him to search the place therein described and to seize and bring before such judge or magistrate the personal property therein described.

(b) The complainant and the warrant issued thereon must contain a description of the personal property to be searched for and seized and a description of the place to be searched, in sufficient detail and particularity to enable the officer serving the warrant to readily ascertain and identify the same.

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FILE COPY

No. 225.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1960.

WILLIAM MARCUS, TITLE NEWS COMPANY, HOMER SMAY, KANSAS CITY NEWS DISTRIBUTORS, JACK GORDON, HARVEY HAMMER, TOWN BOOK STORE, RUBACK'S NEWS STAND, JACK K. RAYBURN, and TED'S NEWS SHOP,

Appellants,

v.

SEARCH WARRANT OF PROPERTY AT 104 EAST TENTH STREET, KANSAS CITY, MISSOURI, SEARCH WARRANT OF PROPERTY AT 3105 EUCLID, KANSAS CITY, MISSOURI, SEARCH WARRANT OF PROPERTY AT 1 EAST THIRTY-NINTH STREET, KANSAS CITY, MISSOURI, SEARCH WARRANT OF PROPERTY AT 123 EAST TWELFTH STREET, KANSAS CITY, MISSOURI, SEARCH WARRANT OF PROPERTY AT 5 WEST TWELFTH STREET, KANSAS CITY, MISSOURI, and SEARCH WARRANT OF PROPERTY AT 221 EAST TWELFTH STREET, KANSAS CITY, MISSOURI,

Appellees.

On Appeal from the Supreme Court of Missouri, En Banc.

BRIEF FOR THE APPELLANTS.

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Appellees.

On Appeal from the Supreme Court of Missouri, En Banc.

BRIEF FOR THE APPELLANTS.

OPINIONS BELOW.

The opinions of the Supreme Court of Missouri en banc (R. 115-128), are reported at 334 S. W. 2d 119. The opinion of the Supreme Court of Missouri, Division Number

Two (R. 103-114) is identical to the main opinion of the Court en banc. The opinion of the Circuit Court of Jackson County, Missouri (R. 81-91), is not reported.

JURISDICTION.

The judgment of the Supreme Court of Missouri En Banc, was entered on March 14, 1960 (R. 130). A timely petition for rehearing was denied on April 11, 1960 (R. 128). Appellants filed their notice of appeal to this Court on May 27, 1960 (R. 131-134). The jurisdiction of this Court to review this decision by direct appeal was invoked under 28 U. S. C., § 1257 (2). On July 11, 1960, the jurisdictional statement was filed. On October 10, 1960, this Court postponed further consideration of the question of jurisdiction to the hearing of the case on the merits (R. 135).

STATUTES INVOLVED.

Sections 542.380, 542.390, 542.400, 542.410, and 542.420, R. S. Mo. 1949, Rule 33 of the Rules of the Supreme Court of Missouri and Amendments 1 and 14 of the United States Constitution are set forth in Appendix A, infra, p. 35.

QUESTIONS PRESENTED.

The violation of appellants' rights of freedom of speech and the press under Amendment One of the United States Constitution as made applicable to the states by Amendment Fourteen of the United States Constitution is in each of the following questions presented.

(1) Whether proceedings under Missouri statutes, §§ 542.380-542.420, R. S. Mo. 1949, and Rule 33 of the Missouri Supreme Court Rules preventing dissemination and distribution of publications alleged to be obscene (but not

yet found to be offensive by any Court), (a) by providing for their ex parte seizure before a trial or hearing is held for determining if their character warrants condemnation and (b) by permitting the general seizure by police officers and deputy sheriffs from retail and wholesale magazine and news vendors of property specified merely as of an obscene character, authorize an unconstitutional censorship and previous restraint of publications.

(2) Whether the determination of the issue of obscenity by a trial judge applying unconstitutional tests and standards of obscenity and a review by an appellate court refusing to set aside the trial judge's judgment on the issue of obscenity because it was not "clearly erroneous" impaired appellants' right of freedom of speech and press.[1]

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[1] A third question in this case is as follows: (3) Whether the publications seized are obscene under the standard set forth in *Roth v. United States*, and *Alberts v. California*, 354 U. S. 476, and whether the finding that the publications are obscene violated appellants' freedom of speech and press. Although appellants believe these publications are not obscene, this question is not being pressed because of the practical difficulties involved in examining 100 separate publications.

STATEMENT.

Sections 542.380-542.420, R. S. Mo. 1949, provide for the seizure of publications alleged to be obscene and authorize their destruction if they are found to be obscene. Section 542.380 provides that upon a verified complaint a search warrant may be issued to a sheriff directing him to search and seize obscene books and publications which are kept for the purpose of distribution or circulation. Section 542.400, R. S. Mo. 1949, requires a hearing within five to twenty days after the search and seizure for determining the character of the property seized and commands that the officer in charge of the seized property "retain possession of the same until after such hearing." Subsequent to the seizure of the publications, the statute also requires notice of the seizure and a hearing opportunity to claimants. If the publications are found to be obscene by the judge issuing the warrant at the hearing, the statute authorizes their destruction. Rule 33 of the Rules of the Missouri Supreme Court deals with the procedural aspects of searches and seizures of personal property when authorized by statute.[2]

Acting under the above statutes, on October 10, 1957, search warrants were obtained from the Circuit Court of Jackson County, Missouri, by an officer of the Police Department of Kansas City. One warrant was directed against the premises of a business wholesaling newspapers, books and magazines (R. 2-3), the remaining five warrants were for premises on which were conducted displays and sales of such publications at retail (R. 1-2, 37-38). The warrants were issued after complaints were filed by the police officer alleging that on October 8, 1957, at the premises of the respective appellants certain persons kept

[2] This rule was drafted and promulgated pursuant to authority granted the court by Section 5 of Article V of the Constitution of 1945 of the State of Missouri which allows that Court to establish rules of practice and procedure for all Courts provided they do not change substantive rights.

property described as "obscene books, papers, drawings, lithographs, engravings, pictures, prints and other articles or publications of an indecent, immoral and scandalous character" for the purpose of selling, publishing, exhibiting or otherwise distributing (R. 2-3). No publication was either specifically mentioned in the complaint nor displayed to the Court before the warrants were issued (R. 39-40). Upon these complaints the Circuit Court issued its search warrants authorizing the search of appellants' premises and the seizure of "said above-described property or any part thereof" and ordering that the property so seized be returned to the Court to be dealt with in accordance with law (R. 3-4).

The search warrants were executed on the issuing day and returns were filed in Court together with inventories of more than 11,000 publications seized.[3] A copy of the inventory was left with the person from whose possession the property was seized. Notices were served upon the interested parties of a hearing to be held in the Circuit Court to determine whether the publications seized constituted obscene, lewd, licentious, indecent, or lascivious material within the meaning of Section 542.380, R. S. Mo. 1949, and as such subject to destruction (R. 5-19). Thereafter, appellants filed separate motions for the immediate return of the property seized and to quash the search warrants (R. 32, 17-23, 1-2).[4] These motions alleged, inter alia, that Section 542.380 and Section 542.400, R. S. Mo. 1949, and Rule 33 of the Missouri Supreme Court Rules, were unconstitutional for the reason that they permitted a search and seizure of publications ex parte without notice or hearing "prior to seizure" and thus constituted "a

[3] The total of the publications set forth in the inventories (R. 6-17).

[4] Appellants, prior to the hearing, filed original and supplemental motions to quash the search warrants and for the immediate return of the seized property (R. 32). Subsequent to the hearing amended motions to quash the search warrants and for the immediate return of the seized property were filed (R. 17-23 1-2).

prior restraint or censorship of said publication," impairing appellants' freedom of speech and publication in violation of Amendments 1 and 14 of the United States Constitution (R. 18-19). Similar constitutional objections were made to the application of the statute and rule to the instant cases and to the issuance of the search warrants (R. 19-21). The motions also alleged that the warrants were illegally issued because the complaints and the warrants did not describe the personal property to be searched for and seized in sufficient detail to enable the person serving the warrant to readily identify the same and that they did not describe the things to be seized as nearly as may be (R. 19-20). The motion concluded with the contention that each ground heretofore enumerated constituted a violation of the due process clause of Amendment 14.

At a hearing held pursuant to the notice given, a Kansas City police officer assigned to its Vice Squad testified he had made an investigation of the five retail news stands involved and purchased five openly displayed magazines. He also determined that the wholesale house was the distributor of all but one of the magazines of a list being investigated (R. 36-38). He later signed the complaints for the search warrants which made no specific mention of any publication (R. 36-37, 2-3). No magazine or other evidence was presented to the Court prior to the issuance of the warrants (R. 39-40, 42). The parties from whom the property was seized were not notified that a complaint would be filed, and were not given an opportunity to be heard prior to the seizure (R. 41-42).

At each of the five retail newsstands, a police officer supervised the search and seizure of the property involved, made a personal selection and determination of which publications to seize and confiscated all publications which he decided were subject to seizure (R. 44, 47-48). At the wholesale distributor, the officers who searched had a list of magazines to be seized prepared by the Police Depart-

ment and further seized anything else which in their judgment merited seizure (R. 50-52). The wholesaler had on hand hundreds of thousands of copies of periodicals (R. 52). Most of the items seized were held for purposes of circulation (R. 53-56).

By its judgment on December 12, 1957, the trial court overruled the motions to quash and for the return of the property and found that 100 of the 280 different publications were in violation of the obscenity statute, Section 542.380 (2) (R. 81-93). The trial court relied on the Missouri decisions of **State v. Pfenninger**, 76 Mo. App. 313; **State v. Mac Sales Co.**, Mo. App. 263 S. W. 2d 860 and **State v. Becker**, 364 Mo. 1079, 272 S. W. 2d 283 and applied the test of "whether the article in question tends to deprave and corrupt the morals by inciting lascivious thoughts or arousing the lustful desire of those whose minds are open to such influences and into whose hands such a publication may fall" (R. 83-84). The court concluded that "in the light of the test laid down by the courts of this State, I am of the opinion that the Exhibits described in Schedule 'A' * * *. are obscene, lewd, licentious, lascivious, indecent and of an immoral and scandalous character, within the meaning and intent of the Missouri Revised Statutes, 1949, Section 542.380" (R. 84-85, 92). The trial judge held that these publications should be retained by the sheriff as necessary evidence for the purpose of possible criminal prosecution and then should be destroyed (R. 85, 92-93). No criminal prosecution was ever instituted. The remaining 180 publications and all copies thereof were ordered to be returned.

The publications found to be obscene were both dated and undated and included the following[5]: Magazines de-

[5] These publications are not obscene under the standard set forth in Roth v. United States and Alberts v. California, 354 U. S. 476. See Sunshine Book Co. v. Summerfield, 355 U. S. 372, reversing D. C. Cir., 249 F. 2d 114 and 128 F. Supp. 564; One, Inc., v. Olesen, 355 U. S. 371, reversing 9 Cir., 241 F. 2d 772; Times Film Corporation v. Chicago, 355 U. S. 35, reversing 7 Cir., 244 F. 2d 432. See also Comm. v. Moniz, 338 Mass. 442, 155 N. E. 2d 762.

signed to promote the cause of nudism (Exhibits 39, 60, 64, 102, 244); photography magazines containing articles and texts designed to assist photographers in taking photographs including some pictures of women with breasts or buttocks exposed (Exhibits 21, 29, 37, 47, 51, 52, 63, 77, 78, 94, 95, 195, 209, 210, 215, 217, 226, 227, 233, 241, 247, 255); other photography magazines containing fewer articles and texts (Exhibits 25, 65, 200); magazines containing texts and articles on a variety of subjects which contained some photographs of women with breasts or buttocks exposed (Exhibits 3, 4, 23, 26, 28, 30, 55, 57, 59, 61, 74, 121, 234); magazines containing pictures of women primarily, some of whom are scantily attired but with no picture displaying women with breasts, buttocks or genitalia exposed (Exhibits 38, 66); magazines containing texts and articles of a non-fictional character, illustrated by photographs, some of which were of women but no pictures displaying bare breasts, buttocks or genitalia (Exhibit 67); magazines containing articles on a variety of subjects designed for circulation among Negroes (Exhibit 7); magazines containing texts including articles by Giovanni Boccaccio and Guy de Maupassant (Exhibits 22, 45); books containing cartoons and jokes similar to those found in nationally known and circulated magazines (Exhibits 257, 271); books containing information and advice regarding the physical, psychological and emotional aspects of marriage (Exhibit 264); modeling magazines (none found at the wholesale distributor) which contained photographs of women, some clothed and some of whom have breasts or buttocks exposed (Exhibits 100, 124, 127, 134, 144, 187, 188, 192, 193, 196, 199, 200, 201, 202, 205, 211, 237, 239, 240); certain publications entitled "Exotique", found only at two retail distributors (221 East 12th and 104 East 10th), some with photographs of persons attired in high heels, boots, gloves, corsets and stockings (Exhibits 197, 214), and others with texts in addition to such photographs (Exhibits 189, 198, 230).

Appellants filed a timely motion for a new trial which realleged the constitutional violations set forth in their pretrial motions (R. 93-99). Objection was further made that the standard applied by the trial Court in its determination of the obscene was "unconstitutional under **Roth v. United States** and **Alberts v. California**, 354 U. S. 476, **Butler v. Michigan**, 352 U. S. 380," impairing appellants' "right of freedom of speech and press" in violation of "the free speech clause of Amendment I of the United States Constitution and the due process and privilege and immunities clause of Amendment 14 of the United States Constitution" (R. 94). This motion was not passed on by the Court within the 90 days after its filing and was thereby deemed automatically denied by Missouri statute on March 23, 1958. Appellants then filed timely notices of appeal to the Supreme Court of Missouri (R. 100-102). On July 13, 1959, Division 2 of the Supreme Court of Missouri entered a decision affirming the judgment of the trial Court (R. 104-114). A timely motion to transfer the case to the Court en banc was filed and on September 14, 1959, the cases were transferred to the Supreme Court of Missouri en banc (R. 115).

The Missouri Supreme Court noted that "constitutional questions have been timely and properly preserved." It summarized appellants' contention relative to the invalidity of the Missouri statute and rule as follows (R. 118-119):

> "The appellants charged that these statutes and the court rule are violative of their constitutional rights of freedom of speech and press guaranteed by Art. I, Sec. 8, Constitution of Missouri 1945, and Amendment I of the United States Constitution as made applicable by the privileges and immunities and due process clauses of the Fourteenth Amendment of the United States Constitution, and guaranteed by the provisions of Art. I, Sec. 15, of the Missouri Constitution protecting them against unreasonable searches and sei-

> zures. They say that the seizure without notice and an opportunity to be heard prior to seizure constitutes a prior restraint or censorship of the publications and allows the police officers and deputy sheriffs to make a judicial determination after the warrant was issued as to which of the appellants' periodicals and magazines were violative of the obscenity statutes and therefore subject to seizure. The appellants assert that freedom of speech and press occupy a preferred position among our constitutional guarantees, Murdock v. Pennsylvania, 319 U. S. 105, 63 S. Ct. 870, 87 L. Ed. 1292, and that there is a distinction between a restraint imposed before circulation of a publication and a penalty imposed by reason of its circulation and that prior restraints can be justified only in most 'exceptional cases', citing Near v. Minnesota ex rel. Olson, 283 U. S. 697-716, 51 S. Ct. 625-631, 75 L. Ed. 1357."

In regard to appellant's contention that the trial Court applied the wrong standards by following **State v. Mac Sales Co.**, Mo. App., 263 S. W. 2d 860, 863; **State v. Pfenninger**, 76 Mo. App. 313, 317, and **State v. Becker**, 336 Mo. 1079, 272 S. W. 2d 283, 287, the Court stated (R. 121):

> "* * * The appellants assert that the trial court applied the test and standards of obscenity stated in those cases and that such tests and standards are violative of their rights of freedom of speech and press under the federal and state constitutions by virtue of the standards adopted by the Supreme Court of the United States in Roth v. United States and Alberts v. California, 354 U. S. 476, 77 S. Ct. 1304, 1 L. Ed. 1398 and Butler v. Michigan, 352 U. S. 380, 77 S. Ct. 524, 1 L. Ed. 2d 412. * * *"

The Missouri Supreme Court affirmed both while sitting in division and en banc (R. 104-114; 116-127), holding that the constitutional questions presented had been resolved

adversely to appellants' contention by **Kingsley Books, Inc. v. Brown**, 354 U. S. 436 and concluding (R. 121):

> "The differences in the Missouri and New York statutes are in degree and not of kind. The New York statute provides for a hearing within one day after seizure and a decision within two days after hearing; Missouri statute provides that the hearing shall be not less than five nor more than twenty days after the seizure. This provision may redound to the benefit of the owners of the publications in preparing their cases for trial. There is no complaint in this case that the appellants sought or desired an earlier hearing and it was refused. It has not been demonstrated that the difference in time of hearing is unreasonable. While publications are seized under the Missouri statute, no temporary injunction is issued as under the New York law. The dealers may continue to sell under the Missouri act if they have or can obtain the publications and desire to do so. The contention that the statutes and the Court rule are unconstitutional in the respects asserted is denied."

The court below held, in regard to the standard applied, that the trial judge's opinion stated and the judgment held that the publications "were obscene, lewd, licentious, lasciyious, indecent and of an immoral and scandalous character 'within the meaning and intent of Missouri Revised Statutes, 1949, Section 542.380' ", that the **Becker** case did not adopt a standard based upon the effect of the publication upon particularly susceptible persons, that the listing of **Becker** in a footnote in the **Roth** and **Alberts** case indicated its standard was constitutional, that appellate review is upon the law and evidence, that a trial court's opinion "is not binding and preclusive even if deemed a statement of grounds of decision", that the judgment should not be set aside unless "clearly erroneous" and that it was not "clearly erroneous" (R. 122, 127).

SUMMARY OF ARGUMENT.

By statute and court rule, Missouri permits a search warrant to be issued for the seizure of all obscene publications at a particular location. Subsequent to the seizure, provisions provide that the judge issuing the warrant, after notice to known claimants, determine if the property is subject to seizure and, if so, to destruction. Acting under such provisions and upon a complaint that "obscene" publications were being kept for circulation by five retail and one wholesale distributor, a trial judge issued warrants directing that all "obscene" publications be seized from their premises. After police and deputy sheriffs seized wholesale quantities of publications from those places, the Court held a hearing and concluded that part of the items seized were subject to seizure and ordered that such items be destroyed.

I.

This court has jurisdiction to review this appeal. The validity of the statutes and rule on grounds of repugnancy to the United States Constitution was presented in both courts below and rejected. The question of the validity of the initial ex parte mass seizure is still alive even though the publications at issue, have been condemned as obscene after a hearing. The entire Missouri statutory scheme has to be considered as a whole and, since it limits freedom of expression, should be condemned in its entirety.

The question relating to the obscenity standard applied by the trial court is cognizable either separately by certiorari or as part of an appeal which is otherwise within this court's jurisdiction. The trial courts decided the obscenity question in reliance on **State v. Becker**, 364 Mo. 1079, 272 S. W. 2d 283, a case which established an uncon-

stitutional test for determining obscenity. The conclusion of the appellate court that the **Becker** case applied a constitutional standard is without a reasonable basis and it does not constitute an adequate non-federal ground of decision.

II.

In **Kingsley Books, Inc. v. Brown**, 354 U. S. 436, this court upheld a state statute which permitted a limited injunctive remedy under closely defined procedural safeguards against the sale and distribution of a specific publication found after due trial to be obscene. The statute withheld restraint upon matters not already published and not yet found to be obscene.

The Missouri statute is vastly different. It permits the seizure of publications prior to any determination that they are in fact obscene. A restraint from circulating is placed before any hearing. Moreover, Missouri does not confine the seizure to a particularly described publication. It authorizes the seizure of all publications at a certain address which the executing police officers find to be "obscene".

The result of the statute is a prior restraint upon publication and circulation. It will restrict the circulation of all writing and cause a self-censorship. Rather than subject his premises to mass seizures, a distributor will tend to restrict his stock to writings which meet the approval of petty police officials.

The major purpose of the constitutional guarantee of free expression was to prevent prior restraint. This court has struck down numerous systems of censorship and licensing. Prior restraints hinder the flow of ideas as well as the development of sound standards of obscenity. At the very least, a publication which has not been ad-

judged obscene cannot constitutionally be banned from circulation.

A trial judge who orders a mass seizure of publications is unsuited for determining the issue of their obscenity because he operates under a compulsion to find some publications obscene. Nor may a state affirmatiyely sanction such police interference with free expression. Such basis rights should be enforced by not allowing a state to condemn any publication under such a method.

There is no overriding public interest which justifies this procedure. Obscenity may be controlled by a penal statute or by a narrow injunctive procedure, essentially penal in nature. It may not be regulated like gambling or intoxicating liquor which are not protected by the First Amendment. The dangers to free expression outweigh the evil the Missouri procedure is supposed to control.

III.

The courts below applied unconstitutional tests of obscenity. The trial court's opinion relied upon **State v. Becker**, 364 Mo. 1079, 272 S. W. 2d 283 in determining the question of obscenity. That case adopted a test which judged the effect of the publication "in the suspectible". The conclusion of the Missouri Supreme Court that the **Becker** case rejected such a standard is not reasonable. Moreover, the appellate court reviewed the case by the clearly erroneous test. This itself is of doubtful constitutional validity where rights of freedom of expression have been determined by a single individual. But, in all the circumstances of this case, these publications have been condemned in violation of the constitution.

ARGUMENT.

I.

This Court has jurisdiction to review this appeal.

Final judgments rendered by the highest state court may be reviewed by this Court if they uphold the validity of a state statute questioned on the ground of repugnancy to the United States Constitution. 28 U. S. C. 1257 (2).

As the Court below recognized (R. 117-119, 127-128, 18-21, 94-95), and as the statement details, the validity of the Missouri statutes and court rule on the ground of repugnancy to the free speech provisions of the United States Constitution were duly raised and presented below. While the main thrust of appellants' contention is on the statutes, the court rule is a "statute" within the meaning of 28 U. S. C. 1257 (2), because it is an enactment which is given the force of law. **Reinman v. Little Rock, Ark.**, 237 U. S. 171, 176.

The claim of unconstitutionality of the statute rests in the first instance on the ex parte mass seizure by police of the publications prior to any determination of the obscenity issue. The question thus presented is whether this issue is still alive after the publications have been condemned by a hearing. We believe this issue is tied to the question of the constitutionality of the Missouri statutes on the merits. This for the reason that, as argued below, the procedure employed for condemnation is unconstitutional and a nullity. The entire Missouri scheme has to be considered as a whole and, since it limits freedom of expression should be invalidated in its entirety. To hold otherwise would allow a State to ban a book by the censorship method. This Court has noted jurisdiction on appeals involving an administrative agency's refusal to issue a license to

a motion picture film distributor for general exhibition of a certain film. Such a license issues unless the film is found to be obscene. E. g., **Kingsley International Pictures Corp. v. Regents of N. Y. U.**, 360 U. S. 684. The system used by Missouri is akin to licensing. Instead of generally requiring a distributor to obtain a license for each publication, Missouri compels a "license" only if a police officer filed a complaint alleging that obscene publications are kept at a particular place. The police officer decides what publications are subject to "license." These he seizes and brings before the Court. The "license" is a court's determination that the publication is not obscene after deciding "whether the property is the kind of property mentioned in section 542.380." Moreover, as argued in point 2, this seizure by search warrant should be struck down, because it has the consequence of unduly curtailing the liberty of freedom of speech and press.[6]

The entire statutory scheme provided by Missouri rests on the seizure. Section 542.380 authorizes the seizure. Section 542.390 lists the contents required by search warrant and the power of the executing officer. Sections 542.400 and 542.410 provide for notice and a hearing to determine whether the property was subject to seizure. Section 542.420 permits the destruction of the property if it was properly seized. Accordingly, the condemnation rests upon the seizure.

Appellants also claim the property was not constitutionally subject to be condemned as obscene and that an unconstitutional standard was used to ban the publication. Thus the second question presented involves the denial of a federal right which is properly before the Court if there is another question cognizable by appeal. Otherwise, it is

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[6] See Grosjean v. American Press Co., 297 U. S. 233; Murdock v. Pennsylvania, 319 U. S. 105.

only subject to review if this Court grants certiorari. This question relates to the standard applied by the trial court in determining the issue of obscurity. This test was questioned below on constitutional grounds (R. 94, 121). The court below attempted to rest this decision on a non-federal ground. But its holding does not rest on an adequate non-federal ground because its position is "without any fair or substantial support." **Staub v. City of Baxley,** 355 U. S. 313, 320. In determining the question of obscenity, the trial court relied on Missouri decisions, such as **State v. Becker,** 364 Mo. 1079, 272 S. W. 2d 283 (Appendix B, infra, pp. 41), which adopted an unconstitutional test of obscenity based on the tendency of the publication to arouse lewd thoughts in the susceptible (R. 83-84). See **Roth v. United States and Alberts v. California,** 354 U. S. 476, 488-489; **Butler v. Michigan,** 352 U. S. 380, 382-383. On appeal the Appellate Court found that its decision in **State v. Becker** had been approved by this Court as applying the correct test because it was listed in a footnote as one of the decisions which rejected the standard applied by **Regina v. Hicklin** (1868), L. R. 3 Q. B. 360.

Undoubtedly the State Court had the power to construe the **Becker** case and to re-examine and overrule it and to declare what the law has been. But the reasonable interpretation of the **Becker** opinion is that it included the effect of the alleged obscene material upon the susceptible. It is also clear that the trial judge applied such a test. The State Court in deciding this case may not do so in such a manner that denies the federal right to have all the publications judged in accordance with the proper standards. See **Brinkerhoff-Faris Trust & Savings Co. v. Hill,** 281 U. S. 673.

The Appellate Court held, on the one hand, that it was not bound by the trial judge's opinion and, on the other hand, that his judgment was not "clearly erroneous" (R.

122, 127). As a result the constitutional standard adopted in **Roth v. United States** and **Alberts v. California**, 354 U. S. 476, 489, based on the effect of the publication upon the average person was not applied. The trial court's opinion was part of the record below. It explained the grounds upon which its judgment was based. It primarily followed the last opinion of the Missouri Supreme Court on the subject of obscenity, an opinion which applied an unconstitutional test. Even if it had not filed an opinion, the trial court would have been bound by the decision of the State Supreme Court under local practice. **Smith v. St. Louis Public Service Co.**, 364 Mo. 104, 259 S. W. 2d 692, 694. The procedure adopted by the Missouri Court should not be allowed to defeat a federal right under the name of local practice when this right was plainly and reasonably made. We accordingly believe that the decision on this point does not rest upon an adequate non-federal ground.

The judgment in this case that the condemned property be destroyed is a final one terminating the litigation (R. 91-93). The Missouri statutes provide for an independent proceeding and are not merely a step in a criminal prosecution. **State v. Mac Sales Co.**, Mo. App., 263 S. W. 2d 860, 862.[7]

This is a case where property has by direction of the Court been taken from appellants and turned over to the sheriff. The Court is able to undo that which has been done by compelling a return of the property illegally confiscated. The property seized still has value, although the monetary value of some of the publications, being dated, has

[7] Similar judgments have been considered to be final in cases arising in the federal courts where the emphasis has been on the return of property rather than its suppression in evidence. E. g. *Steele v. United States*, No. 1, 267 U. S. 498; *United States v. Kirschenblatt*, 2 Cir., 16 F. 2d 202; *Burdeau v. McDowell*, 256 F. 2d 465 cf. *Cargoll v. United States*, 354 U. S. 394, and *Perlman v. United States*, 247 U. S. 7.

probably been reduced by the passage of time. Indeed the desire of the State officials to still destroy the property is itself an indication of its value.

II.

The Missouri procedure imposes an unconstitutional prior restraint on freedom of communication by permitting a mass seizure of publications at the discretion of the police prior to any determination that the publications subject to seizure are in fact obscene.

In **Kingsley Books, Inc. v. Brown,** 354 U. S. 436, a New York obscenity statute authorized a municipality to bring an injunction suit to prevent the sale or distribution of an obscene publication or matter and further provided that the person sought to be enjoined was entitled to a trial of the issues within one day after joinder of the issues and a decision by the Court within two days after the conclusion of the trial. A complaint charged petitioners with displaying for sale a specific obscene booklet. It prayed that they be enjoined from further distribution of the booklet, that they be required to surrender to the sheriff for destruction all copies in their possession and that, upon failure so to do, the sheriff be commanded to seize and destroy the copies. On the same day petitioners were ordered to show cause within four days why they should not be enjoined pendente lite from distributing the books. Petitioners consented to an injunction pendente lite. After a trial, the booklet was found obscene, its further distribution enjoined and destruction of all copies ordered.

This Court upheld the New York procedure against the booksellers and their particularly named booklet. It noted that the statute permitted a "'limited injunctive remedy' under closely defined procedural safeguards,

against the sale and distribution of written and printed matter found after due trial to be obscene, and to obtain an order for the seizure, in default of surrender, of the condemned publications" 354 U. S. at 437. The opinion compared the statute with a criminal obscenity statute and found similar restraints imposed with the same threat of subsequent penalization as an effective deterent against distribution. The Court was careful to point out that a New York book seller, even after the injunction procedure is instituted, may still sell the accused book, subject to punishment for contempt. But this the Court says is no different than being subject to penalties under criminal statutes. The Court concluded that the statute "studiously withholds restraint upon matters not already published and not yet found to be obscene." 354 U. S. at 445.

In Missouri, the statute as construed authorizes a police officer to file a complaint directed at a specific location distributing magazines, books and newspapers, alleging that it has kept for the purpose of selling, publishing, distributing or circulating "obscene, lewd, licentious, indecent and lascivious books, pamphlets, papers * * * pictures * * * and other articles or publications of an indecent, immoral and scandalous character" (R. 2-3). On the basis of such a complaint, a Court may issue a search warrant commanding a peace officer to search the specific premises and seize and take into his possession property described as "obscene, lewd, licentious, indecent and lascivious books, pamphlets, papers * * * pictures * * * and other articles or publications of an indecent, immoral and scandalous character" (R. 3-4). The statute, after seizure, requires a hearing to determine the character of the property and commands that the peace officer retain possession of the property until after the hearing. At the hearing it then becomes the duty of the judge issuing the warrant to decide whether the property seized was subject to seizure and as such liable to destruction. On appeal, his findings

are not subject to correction unless they are "clearly erroneous."[8]

We believe that the Missouri procedure and the New York procedure are vastly different in kind and that the distinction between them points out the basic unconstitutionality of the Missouri procedure. New York has a limited injunctive remedy under closely defined procedural safeguards. Missouri has a broad seizure provision permitting loosely defined action.

New York withholds restraint upon publications not yet found to be offensive and permits the seizure of printed matter, if found to be obscene, subsequent to trial only.[9] Until a publication is declared obscene by a Court, the distributor may keep his periodical and sell it at his own risk. He is not restrained from circulating before the determination that it is offensive if he chooses to risk

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[8] Under the New York statute the determination of obscenity by trial judge is subject to full appellate review on the law and the facts. N. Y. Civ. Prac. Act, § 584.

[9] In 1955 New York Legislative Bill No. 2801 would have amended the act to permit an injunction and seizure without notice, but it was vetoed by the governor. The new subsection it would have added read as follows:

> 1-a. Before or at the time of the commencement of the action for an injunction herein described any such officer may apply for an injunction order under section eight hundred seventy-seven of the civil practice act without notice to the person, firm or corporation sought to be enjoined; and such person firm or corporation may make an application to vacate or modify such injunction order under section eight hundred ninety-seven or section eight hundred ninety-eight of the civil practice act. Such order shall provide for the retention or seizure of any of the matter described in paragraph one hereof pending a determination of the issues by the court. Any peace officer may serve a copy of such order and, in connection with such service, is hereby empowered to search any premises where such matter is stored and make an inventory of the material covered by such order. When seizure is directed by such order, the peace officer shall leave an itemized receipt for the material seized. A copy of the inventory shall also be filed in the court without delay.

punishment.[10] **Kingsley** notes that the problem of interim activity pending the hearing on the obscenity issue was not before the Court. Professor Paul A. Freund in considering the problem of interim violations where a restraining order has been issued or a permit withheld has concluded: "If disobedience of the interim order is ipso facto contempt, with no opportunity to escape by showing the invalidity of the order on the merits, the restraint does indeed have a chilling effect beyond that of a criminal statute."[11] Missouri solves the interim problem by the seizure of publications prior to any determination that they are in fact obscene. The distributor is not given any choice as to whether he will continue to circulate the material or withdraw it. Rather the circulation is summarily curtailed by police officers without notice or an opportunity to be heard and prior to any judicial determination as to the character of the material. All the copies of a particular publication in any distributor's possession are seized by the police prior to any hearing. No opportunity to escape the ban pending the final determination is allowed except if the distributor is financially and otherwise able to secure additional copies. But these also may be summarily seized. Indeed he would be inviting a further mass seizure if he obtained any publication not approved by the police censor.

In New York, the action is confined against a particular publication named in a complaint. Missouri does not narrowly limit the seizure to a particularly described publication or even to a publication displayed to a Court prior to seizure. Rather it authorizes the executing police officer to seize all publications which he concludes fit the

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[10] Freedom of speech includes liberty of circulation. *Lovell v. Griffin*, 303 U. S. 444; *Winters v. New York*, 333 U. S. 507, 509; *Talley v. California*, 362 U. S. 60.

[11] Freund, The Supreme Court and Civil Liberties, 4 Vand. L. Rev. 533, 539.

general description of obscene, lewd, licentious, indecent and lascivious or articles or publications of an indecent, immoral and scandalous character. The purpose of this procedure is to "protect the public from character contamination" by preventing the dissemination of obscenity (R. 120).

Even if a seizure of specific alleged obscene publications prior to a hearing is permissible under limited circumstances, the clean-sweep seizure authorized by this State would violate the constitutional guaranty of free speech and press. There is no question that some of the publications seized were not obscene. Indeed, the trial judge so found. But these were swept into the ambit of the warrants.[12] Missouri allows an examination of all thought and expression at a particular location if a police officer files an affidavit stating that the particular premises contains obscene matter providing a judge authorizes such action on the affidavit. The general description in the warrants are broader in scope than the executive warrant to search for evidence of the utterance of libel condemned in **Entick v. Carrington**, 19 Howell's State Trials, col. 1029. See **Frank v. Maryland**, 359 U. S. 360. Neither police nor any other executive censor should be allowed to seize all material from a magazine or bookseller which they determine falls within a general warrant allowing seizure of all obscene material. Especially is this so when the magazines or books have been openly displayed for sale and may be described by name, volume or issue.

The effect of the Missouri provisions is that a State, ex parte, prior to any hearing in order to determine the nature of the publications which a distributor possesses,

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[12] A statute limiting freedom of expression which does not aim specifically at evils within the allowable area of State control is invalid. *Thornhill v. Alabama*, 310 U. S. 88; *Winters v. New York*, 333 U. S. 507.

may obtain possession of all of his publications which a petty police official finds objectionable and retain these publications at least until after a hearing before the single judge who has authorized the seizure, determines the obscenity issue.[13] The distributor has no right to the publications unless this single judge finds that the material is not obscene or the appellate court upon review finds that the trial judge's conclusion were clearly erroneous. The result is a limitation upon circulation prior to dissemination to the public. When the publications are seized the material contained there must be examined in order to prevent publication and circulation of objectionable material. The items are censored by review and approval prior to distribution. A magazine or bookseller should have the right to circulate his material subject to subsequent restraint if the matter violates the obscenity laws. As long as the distributor is willing to risk the imposition of criminal law or contempt penalties he has a right to proceed with its distribution, and any restriction of that right is unwarranted since, among other things, it would deprive the public of the opportunity of reading and making its own appraisal of the challenged material.

The approval of such a procedure authorizing a mass seizure will only restrict the circulation of all writings. It will cause a self-imposed restriction of free expression. A book or magazine seller, knowing that his entire stock is subject to seizure and his business disrupted in the event that any petty police official considers a single publication unfit, will naturally hesitate to stock any publication which does not meet the approval of such petty official. The whim and taste of every minor official thus becomes the basis for the curtailment of expression with its resultant restriction of the communication of

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[13] Such a seizure, applied to a newspaper, would destroy the value of any news item of current significance.

ideas. The rationale of **Smith v. California,** 361 U. S. 147 supports this contention. Defendant was there convicted of violation of an ordinance which made it unlawful for a person to possess any obscene book in a bookstore. The California courts, upon a judicial investigation, found the book involved to be obscene and construed the ordinance as not requiring an element of scienter. California law thus did not require that the book dealer have knowledge of the contents of the book and the ordinance was construed as imposing a strict or absolute criminal liability. This Court held the ordinance to be unconstitutional on the ground that, by not so requiring knowledge on the part of the book seller, this operated as a self-censorship on the book seller and tended to restrict the sale of books to those he has inspected. In the instant case, the seller will tend to restrict the books he sells to those the police official has inspected or approved. "Freedoms such as these are protected not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference". **Bates v. City of Little Rock,** 361 U. S. 516.

We do not know what test the police and sheriff applied in the first instance in seizing the publications. But we know that the application of the correct constitutional test of obscenity is a task of great magnitude. The determination of whether a book, as a whole, has "a substantial tendency to deprave or corrupt its readers by inciting lascivious thoughts or arousing lustful desires," or "whether to the average person applying contemporary community standard, the dominant theme of the material taken as a whole appeals to prurient interests" is a perplexing and baffling problem. **Roth v. United States and Alberts v. California,** 354 U. S. 476, 486, 489. It "ought not to depend solely on the necessarily limited, hit-or-miss, subjective view" of the individual policeman or deputy sheriff. Sex and its portrayal are not synonomous with

obscenity. Only material dealing with sex in a manner appealing to prurient interests is obscene. 354 U. S. at 487. Furthermore, obscenity cannot be determined solely from the nature of the material but the question of customary freedom of expression has to be considered. A publication must be tested by contemporary community standards. And obscenity is not as "distinct, recognizable, and classifiable as poison ivy." "The separation of legitimate from illegitimate speech calls for more sensitive tools than [Missouri] has supplied." **Speiser v. Randall,** 357 U. S. 513, 525.

Indeed, Missouri permits what **Near v. State of Minnesota ex rel. Olson,** 283 U. S. 697 forbade. In **Near,** the defendant was enjoined from acting in the future because of past conduct. In Missouri, if a policeman concludes that a person has violated the obscenity laws, he may seize not only what he has concluded was the past violation but, in his future execution of a search warrant, may seize anything else he deems offensive.

Two authorities on obscenity have recognized that a serious threat to mass suppression of books lies in secret lists distributed by private or public officials threatening prosecution unless the books are removed from circulation. Lockhart & McClure, Literature, The Law of Obscenity and the Constitution, 38 Minn. L. Rev. 295, 395. Their view has been followed by the courts which have dealt with such issues. Threats of police and prosecuting officials to prosecute if a book is circulated have been enjoined because such actions effect a ban upon its sale by a non-judicial determination. **New American Library of World Literature v. Allen,** N. D. Ohio, 114 F. Supp. 823; **Bantam Books, Inc. v. Melko,** 25 N. J. Super. 292, 96 A. 2d 47; **HMH Pub. Co. v. Garrett, N. D. Ind.,** 151 F. Supp. 903; **Sunshine Book Co. v. McCaffrey,** 4 App. Div. 2d 643, 647 (N. Y.). And if the threat is illegal, the actual seizure

which makes the circulation impossible should likewise be illegal.

The Court below distinguished the New York and Missouri statutory schemes as a difference of degree based upon the time differentials. But the number of days between the institution of the proceeding in New York and the hearing without an intervening seizure is in no sense material in comparing the New York statute with the number of days provided in Missouri after seizure and the subsequent Court hearing. There is a curtailment in circulation in Missouri prior to any judicial determination outlawing the publication. The administrative censor, the policeman on the beat or the vice squad, is allowed to curtail circulation prior to approval. The number of days so intervening is meaningless because the unilateral seizure has already been accomplished and the absolute restraint imposed.

Such seizure was not allowed under the English common law which only authorized the seizure of stolen goods under a search warrant. **Entick v. Carrington,** 19 Howell's State Trials, Col. 1029; **Boyd v. United States,** 116 U. S. 616, 623. It was not until the passage of the Obscene Publications Act of 1857, 20 and 21 Vict. c. 83, that the seizure of obscene publications was allowed there under a search warrant.[14] The famous obscenity case of **Regina v. Hicklin** [1868], L. R. 3 Q. B. 360 involved such a procedure under that act. See Alpert, Judicial Censorship of Obscene Literature, 52 Harv. L. Rev. 40, 50-52.

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[14] The germ of the Missouri statute is to be found in Mo. Laws 1875, p. 100. It assumed its present form in Mo. Laws 1909, p. 440. Massachusetts enacted a seizure statute in 1835. Revised Statutes of the Commonwealth of Massachusetts, c. 130, § 11 (1836). See Grant and Angoff, Massachusetts and Censorship, III, 10 B. U. L. Rev. 147, 148 (1930). The postal laws forbidding the depositing of obscene publications in the mail authorized the issuance of a search warrant. Act of March 3, 1873, 17 Stat. 598, 599-600. A seizure provision is also contained in the tariff act. Act of August 30, 1842, 5 Stat. 548, 566-567.

The First Amendment was drafted with memories of England's licenses still fresh in the minds of the colonists. Accordingly, the major, though not exclusive purpose of the guarantee of free expression, is "to prevent previous restraints upon publications." **Near v. State of Minnesota, ex rel. Olson**, 283 U. S. 697, 713. The principle of immunity from prior restraint has been applied in a variety of situations to strike down licensing or censorship systems under which the right of speech, publication or assembly was conditioned upon obtaining the advance approval of an executive board or official vested with broad or undefined discretion. **Joseph Burstyn, Inc. v. Wilson**, 343 U. S. 495; **Staub v. City of Baxley**, 355 U. S. 313; **Superior Films, Inc. v. Dept. of Education of Ohio**, 346 U. S. 587; **Kunz v. People of State of New York**, 340 U. S. 290; **Niemotko v. State of Maryland**, 340 U. S. 268; **Thomas v. Collins**, 323 U. S. 516; **Lovell v. Griffin**, 303 U. S. 444. And censorship by the judiciary is just as impermissible as advance censorship by an administrative office. **Cantwell v. State of Connecticut**, 310 U. S. 296, 306.

Prior restraints hinder the development of sound standards for determining what is obscene. If prior restraints keep the public from knowing what books are being censored, public opinion, the very thing that should influence standards for determining obscenity, is prevented from doing so. Without prior restraint the public can know what publications are being banned as being obscene, and if so, demand more satisfactory methods for determining obscenity.[15] Public influence is also valuable in determining the outcome of individual cases. The public approval of the merits of a publication may influence the Court's decisions and prior restraint to remove this important public influence should be discouraged. See Emer-

[15] Even publications of no social worth are entitled to be shielded from unlawful or unconstitutional restraint. *Winters v. People of State of New York*, 333 U. S. 507.

son, The Doctrine of Prior Restraint, 20 Law & Contemp. Prob. 648.

At the very least until a publication has been adjudged to be obscene it cannot constitutionally be withheld from free circulation in the market place of ideas. Apart from the rights of the publisher and vendor the public itself has the right to read and examine whatever is published and to form its own opinion of the publication's value and propriety.

We should not overlook the institutional framework in which a trial judge operates under such a statute as the Missouri one. The function of the trial judge becomes that of a censor. He is given a whole variety of publications seized under a mass seizure. Since he, himself, issued the warrant and found probable cause he has interest in finding things to suppress. This forecloses or embarrasses further consideration of the case with its attendant danger of suppressing a legitimate utterance.

Just as a state may not affirmatively sanction police incursion into privacy,[16] a state may not affirmatively sanction a procedure which creates a substantial danger that legitimate utterances will be penalized or suppressed. In the former case, the remedy is to suppress the evidence. In the latter situation, the remedy should be to condemn the entire practice and to require the use of legitimate methods of combating obscenity.

While it has been said that the right of free expression is not absolute or unqualified under all circumstances it has also been stated that any invasion of that right must find justification in some overriding public interest and that restricting legislation must be narrowly drawn to meet an evil which the State has a substantial interest

[16] *Wolf v. Colorado*, 338 U. S. 25.

in correcting. **Joseph Burstyn, Inc., v. Wilson**, 343 U. S. 495, 502, 504. This Missouri has not done. And as we have shown, the method of procedure adopted is far from the narrow exception to freedom of expression allowed in the **Kingsley Book** case.

Missouri regulates alleged obscenity in the same manner as it controls gambling, intoxicating liquor and diseased cattle. The Missouri Supreme Court's view of obscenity was that "its dissemination should be prevented just as certainly as the spread of disease germs should be curbed among the members of the community. The courts have never hesitated to enjoin potential menaces to public health or to approve the vaccination or inoculation of school children and others when reasonably required. Obviously, a state government does not have to permit the homes of its citizens to be destroyed by fire when the arson can be reasonably prevented" (R. 120).

But, it is unreasonable to attempt to place statutes dealing with alleged obscene publications on the same footing as statutes directed generally against gambling, intoxicating liquor or disease, **Smith v. California**, 361 U. S. 147. The specific constitutional guarantees of freedom of speech and of the press stand in the way of allowing publications to be seized in like manner. There is no similar specific constitutional inhibition applicable to gambling equipment, intoxicating liquor or disease; yet it was the conclusion of the Court below that books, pamphlets, magazines, and all writings can be regulated by a state in like manner.

The evil which the Missouri statutes seek to avoid is the prevention of the dissemination of obscenity in order to protect the public from character contamination (R. 120). But the relative seriousness of this supposed evil and the degree of probability that this evil will result are outweighed by the dangers to free expression under its statu-

tory scheme. It certainly does not justify the short-cut procedure which was utilized in this case. **Speiser v. Randall**, 357 U. S. 513, 529.

III.

The courts below applied unconstitutional tests of obscenity.

The opinion of the trial judge shows that he applied unconstitutional tests of obscenity (R. 81-91). He relied principally on the opinion of the Missouri Supreme Court in **State v. Becker**, 364 Mo. 1079, 272 S. W. 2d 283 (Appendix B, infra, p. 41). His quotes from the earlier Missouri cases of **State v. Mac Sales Co.**, Mo. App., 265 S. W. 2d 860 and **State v. Pfenninger**, 76 Mo. App. 313 are the same quotes found in the **Becker** case. It is clear that he applied the test of whether the publication might incite lascivious thoughts or arouse lustful desires "of those whose minds are open to such influences and into whose hands such a publication may fall" and whether the publication "would arouse lewd or lascivious thoughts in the susceptible" (R. 83-84). Such a test would make it impossible to make available for the general public a book found to have a potentially deleterious influence on children. **Butler v. Michigan**, 352 U. S. 380; **Volanski v. United States**, 6 Cir., 246 F. 2d 842; **Goldstein v. Commonwealth of Virginia**, 104 S. E. 2d 66. Nor did the trial judge make any finding that the publications condemned had a substantial tendency to corrupt or deprave the average person. **Roth v. United States**, 354 U. S. 476, 487. Indeed he even ignored the dominant theme of the material and made no finding that the predominant appeal of the publications considered as a whole was to prurient interests. On the contrary the explicit view of the trial Court was that the book would tend to deprave those who were susceptible. The trial Court also did not apply contemporary communi-

ity standards as a test for obscenity and excluded from consideration whether each publication "goes substantially beyond customary limits of candor, description or representation." 354 U. S. at 487, fn. 20.

It is also clear that the reasonable interpretation of the **Becker** case is that it adopted the test originally stated in **Regina v. Hicklin** [1868], L. R. 3 Q. B. 360: ". . . whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall." Let us examine **Becker**. The Court first applied such a test to determine whether the nudist publications before it were obscene. Its use of this standard is further apparent when it determines that the testimony of the expert witness offered by the defense was properly excluded, stating: "No college professor or other expert was required to determine whether these publications are obscene and offensive to good morals, or might arouse lustful desires, or encourage commission of crime by the susceptible man or woman, boy or girl.". 272 S. W. 2d at 287. Finally, in determining the meaning of the words "indecent, immoral or scandalous" in the statute, the court concluded that indecent means "that which would arouse lewd or lascivious thoughts in the susceptible" and that these words are synonymous with obscene. 272 S. W. 2d at 287-288. We are not alone in our interpretation of the test adopted by **Becker**. Two noted authorities on obscenity have described that case as applying the "antedeluvian point of view". Lockhart and McClure, Obscenity in the Courts, 20 Law & Contemp. Prob. 587, 606 (1955).

On appeal, the appellate court found that its decision in **State v. Becker**, was approved by this Court in the **Roth** case because the **Becker** case was listed in a footnote as one of the decisions which has rejected the Hicklin test

and substituted the proper standard. The court below never met the issue as to whether the publications were obscene under the constitutional tests. On the one hand, it held that it was not bound by the trial Court's opinion (R. 122), and, on the other hand, it concluded that the judgment of the lower Court was not "clearly erroneous" (R. 127). As a result, the Missouri Supreme Court did not squarely meet the issue as to whether the test applied to the publications was a proper one in view of **Roth v. United States** and **Alberts v. California**, 354 U. S. 476. The result of the trial and the appellate courts' opinions is that the correct test of obscenity is never applied to the publications in this case. To hold that the appellate court is not bound by such findings and conclusions, and that the trial judge's decision is not clearly erroneous, does not constitute a review of the alleged obscenity of the material in question by a proper standard, as set out in **Roth v. United States**, 354 U. S. 476, and thereby impairs appellants' freedom of speech.

The procedure adopted in this case was designed to avoid the requirement of a jury. The statutes here involved provide for the determination of that issue after seizure by the judge who issues the warrant. Under such circumstances, it is questionable whether an appellate Court may constitutionally apply the "clearly erroneous" test in reviewing a finding that a publication is obscene based upon documentary evidence. Before a finding is reversed in a case employing such a test, the record must leave the court with a definite and firm conviction that a mistake has been made.[17] Yet the possibility of mistaken fact-finding creates the danger that the legitimate utterance will be penalized. **Speiser v. Randall**, 357 U. S. 513, 526. Liberty of the press is more secure if full appellate review

[17] *United States v. Oregon State Medical Soc.*, 343 U. S. 326, 339.

is allowed. 1 Chaffee, Government and Mass Communications, pp. 221-225.

But we do not have to reach that issue in this case. Rather we have a mass seizure by a police official, a hearing before a trial judge who followed an opinion that adopted an unconstitutional standard and a review by an appellate court which applied a "clearly erroneous" test to a case which was never properly decided. The result is the condemnation of these publications in violation of the constitution.

CONCLUSION.

It is submitted that the judgment below should be reversed.

Respectfully submitted,

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APPENDIX A.

Constitutional Provisions and Missouri Statutes and Court Rule Involved.

The First Amendment of the Constitution provides in pertinent part:

> Congress shall make no law * * * abridging the freedom of speech, or of the press * * *

The Fourteenth Amendment of the Constitution provides in pertinent part:

> * * * No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; * * *

Chapter 542 of the Missouri Revised Statutes 1949 contains the following statutes:

> **542.380. Warrant may be issued for seizure of certain propery, when.**—Upon complaint being made, on oath, in writing, to any officer authorized to issue process for the apprehension of offenders, that any of the property or articles herein named are kept within the county of such officer, if he shall be satisfied that there is reasonable ground for such complaint, shall issue a warrant to the sheriff or any constable of the county, directing him to search for and seize any of the following property or articles:
>
> (1) Any gaming table, or other gaming device or apparatus used in gambling, or any books, instruments, boards, devices or paraphernalia used in reporting, recording, communicating or registering bets or wagers, or selling pools, or property owned by any person

furnishing public communication services to the general public subject to the regulations of the public service commission after such person has failed to remove the property within a reasonable time after receipt of written notice from an official charged with enforcement of the law stating that such property is being used as an instrumentality to violate the law, or any other gambling device prohibited by law;

(2) Any of the following articles, kept for the purpose of being sold, published, exhibited, given away or otherwise distributed or circulated, viz.: obscene, lewd, licentious, indecent or lascivious books, pamphlets, ballads, papers, drawings, lithographs, engravings, pictures, models, casts, prints or other articles or publications of an indecent, immoral or scandalous character, or any letters, handbills, cards, circulars, books, pamphlets or advertisements or notices of any kind giving information, directly or indirectly, when, where, how or of whom any of such things can be obtained;

(3) Any of the following articles, kept for the purpose of being sold, given away or otherwise distributed or circulated, contrary to law, viz.: pills, powders, medicines, drugs or nostrums, or instruments or other articles or devices for preventing conception, producing or procuring abortion or miscarriage, or other indecent or immoral use, or any letters, handbills, cards, circulars, books, pamphlets, advertisements or notices of any kind describing or purporting to describe any of such articles, or giving information, directly or indirectly, when, where, how, or of whom any of such things can be obtained;

(4) All articles or raw materials found in the possession of any person or persons intending to manufacture the same into any articles or things heretofore in this section described, and also all tools, ma-

chinery, implements and personal property where such articles are found and seized and used or intended to be used in the manufacture of such articles and things.

Section 542.390. Warrant shall describe place and articles to be seized or searched for—power of officer.—Such search warrants shall describe the place to be searched or the things to be seized, as nearly as may be, and shall direct the officer serving the same to seize such articles and bring them before the judge or magistrate issuing the warrant. The officer who shall be charged with the execution of any warrant specified in sections 542.380 and 542.390 shall have power, if necessary, to break open doors for the purpose of executing the said warrant, and for that purpose may summon to his aid the power of the county.

Section 542.400. Defendant to have notice of date of hearing.—The judge or magistrate issuing the warrant shall set a day, not less than five days nor more than twenty days after the date of such service and seizure, for determining whether such property is the kind of property mentioned in section 542.380, and shall order the officer having such property in charge to retain possession of the same until after such hearing. Written notice of the date and place of such hearing shall be given, at least five days before such date, by posting a copy of such notice in a conspicuous place upon the premises in which such property is seized and by delivering a copy of such notice to any person claiming an interest in such property, whose name may be known to the person making the complaint or to the officer issuing or serving such warrant, or leaving the same at the usual place of abode of such person with any member of his family or household above the age of fifteen years. Such notice shall be signed by the magistrate or judge or by the clerk of the court of such judge.

Section 542.410. Rights of property owner.—The owner or owners of such property may appear at such hearing and defend against the charges as to the nature and use of the property so seized, and such judge or magistrate shall determine, from the evidence produced at such hearing, whether the property is the kind of property mentioned in section 542.380.

Section 542.420. Disposition of property.—If the judge or magistrate hearing such cause shall determine that the property or articles are of the kind mentioned in section 542.380, he shall cause the same to be publicly destroyed, by burning or otherwise, and if he find that such property is not of the kind mentioned, he shall order the same returned to its owner. If it appears that it may be necessary to use such articles or property as evidence in any criminal prosecution, the judge or magistrate shall order the officer having possession of them to retain such possession until such necessity no longer exists, and they shall neither be destroyed nor returned to the owner until they are no longer needed as such evidence.

* * * * * * *

Rule 33 of the Rules of Criminal Procedure of the Missouri Supreme Court provides in pertinent part:

33.01—Searches and Seizures—Complaint—Search Warrant—Description of Property and Place. (a) If a complaint in writing be filed with the judge or magistrate of any court having original jurisdiction to try criminal offenses stating that personal property (1) which has been stolen or embezzled, or (2) the seizure of which under search warrant is now or may hereafter be authorized by any statute of this State, is being held or kept at any place or in any building, boat, vessel, car, train, wagon, aircraft, motor vehicle or other vehicle or upon any person within the terri-

torial jurisdiction of such judge or magistrate, and if such complaint be verified by the oath or affirmation of the complainant and states such facts positively and not upon information or belief; or if the same be supported by written affidavits verified by oath or affirmation stating evidential facts from which such judge or magistrate determines the existence of probable cause, then such judge or magistrate shall issue a search warrant directed to any peace officer commanding him to search the place therein described and to seize and bring before such judge or magistrate the personal property therein described.

(b) The complainant and the warrant issued thereon must contain a description of the personal property to be searched for and seized and a description of the place to be searched, in sufficient detail and particularity to enable the officer serving the warrant to readily ascertain and identify the same.

* * * * * * *

33.03—Searches and Seizures—Motion to Suppress—Return of Property. (a) A person aggrieved by an unlawful search and seizure made by a peace officer and against whom there is pending any criminal proceeding growing out of the subject matter of said search and seizure, may file in the court in which such proceeding is pending, a motion to suppress the use in evidence of the articles taken by means of such seizure and any evidence gained by the peace officers by means of such search. Such motion may be based upon any one or more of the following grounds:

1. That the search and seizure were made without warrant and without other lawful authority;

2. That the warrant was improper upon its face or was illegally issued (including the issuance of warrant without a proper showing of probable cause);

3. That the property seized was not that described in the warrant and that the officer was not otherwise lawfully privileged to seize the same;

4. That the warrant was illegally executed by the officer;

5. That in any other manner the search and seizure violated the rights of the movant under Section 15 of Article 1 of the Constitution of Missouri or Amendment 14 of the Constitution of the United States. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. The motion to suppress evidence shall be filed before the commencement of the trial or hearing unless opportunity therefor did not exist or unless the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain such a motion during the trial or hearing.

(b) If the property alleged to have been unlawfully seized is not of such a nature that its possession would constitute a criminal offense under the laws of this State, then such motion may pray for and the court, if the motion be sustained, may order the return of such property to the person from whom it was taken. In such case the motion may be filed with the court in which a criminal proceeding against the person from whom such property was taken is pending or if there be no such proceeding pending, the motion may be filed with the judge or magistrate issuing the warrant under which the search was made."

* * * * * * *

APPENDIX B.

State v. Becker, 364 Mo. 1079, 272 S. W. 2d 283, affirmed a conviction for the possession with intent to sell and circulate certain nudist publications in violation of the Missouri criminal obscenity statute, § 563.280, R. S. Mo. 1949. The parts of the opinion which bear upon the standard of obscenity adopted by the Supreme Court of Missouri follow:

* * * * * * *

Defendant's brief asserts that the first issue to be decided in this case is whether the instant publications are "obscene, lewd, licentious, indecent or lascivious or of an indecent, immoral or scandalous character." A determination of that question will rule defendant's first contention and assignment of error.

In the case of State v. Mac Sales Co., Mo. App., 263 S. W. 2d 860, loc. cit. 863, the St. Louis Court of Appeals stated: "With reference to (4), supra, one test of obscenity is whether the article in question tends to deprave and corrupt the morals by inciting lascivious thoughts or arousing the lustful desire of those whose minds are open to such influences and into whose hands such a publication may fall. 33 Am. Jur., Lewdness, Indecency and Obscenity, § 4, p. 17; 67 C. J. S., Obscenity, § 7c, p. 30 et seq. We have defined obscenity as 'such indecency as is calculated to promote the violation of the law and the general corruption of morals * * * and include what is foul and indecent, as well as immodest, or calculated to excite impure desires.' State v. Pfenninger, 76 Mo. App. 313."

The test of obscenity is set forth in 67 C. J. S., Obscenity, § 7, p. 30, as follows: "The test which determines the obscenity or indecency of a publication is the tendency of the matter to deprave and corrupt the morals by inciting the lascivious thoughts or arousing

the lustful desire of those whose minds are open to such influences, and into whose hands such a publication may fall. * * *"

A test frequently relied upon by courts in this country is that stated by Cockburn, Ch. J., in the case of Reg. v. Hicklin [1868], L. R. 3 Q. B. 360, 371, 8 Eng. Rul. Cas. 60: "I think the test of obscenity is this: whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall."

In United States v. Harmon, D. C., 45 F. 414, loc. cit. 417, the court, in discussing the statute prohibiting the use of the mails for obscene matter, stated: "Laws of this character are made for society in the aggregate, and not in particular. So, while there may be individuals and societies of men and women of peculiar notions or idiosyncrasies, whose moral sense would neither be depraved nor offended by the publication now under consideration, yet the exceptional sensibility, or want of sensibility, of such cannot be allowed as a standard by which its obscenity or indecency is to be tested. Rather is the test, What is the judgment of the aggregate sense of the community reached by it? What is its probable, reasonable effect on the sense of decency, purity, and chastity of society, extending to the family, made up of men and women, young boys and girls, * * *."

See also, King v. Commonwealth, 313 Ky. 741, 233 S. W. 2d 522; Commonwealth v. Donaducy, 167 Pa. Super. 611, 76 A. 2d 440, 442; Commonwealth v. New, 142 Pa. Super. 358, 16 A. 2d 437; State v. Weitershausen, 11 N. J. Super. 487, 78 A. 2d 595; People v. Eagle, 203 Misc. 598, 117 N. Y. S. 2d 380; People v. Ring, 267 Mich. 657, 255 N. W. 373, 375, 93 A. L. R. 993, and cases collected in 29 Words and Phrases, Obscene, page 68 et seq.

It is our duty and responsibility to determine whether these publications are obscene, lewd, lascivious, licentious, and of a scandalous, indecent or immoral character. It seems clear to us that they are. Even judges may know what falls within the classification of the decent, the chaste and the pure in either social life or in publications, and what must be deemed obscene and lewd and immoral and scandalous and lascivious. These questions have been considered and tested objectively as to the effect of these publications in their entirety upon persons of average human instincts. The people of this State speaking with their constitutional voice, the General Assembly, enacted this statutory proscription of obscenity for the protection of **all** the people of the State. Under this statute and the prior rulings of the courts we may not disregard an unambiguous enactment which has as its obvious purpose the protection of the morals of the susceptible into whose hands these publications may come. While we recognize that morality may not be attained by legislation, a people nonetheless need and deserve a moral standard and the protection and enforcement of such a statute. After applying the required tests all the members of this Court have concluded that the contents of these publications tend to incite lascivious thoughts, arouse lustful desire, encourage breaches of the law, and promote and encourage commission of crime, law and violation and moral decay. Defendant's first contention is therefore denied.

In support of his first contention defendant relies upon and cites to us such cases as Parmelee v. United States, 72 App. D. C. 203, 113 F. 2d 729; United States v. One Book Entitled Ulysses, 2 Cir., 72 F. 2d 705; State v. Lerner, Ohio Com. Pl., 81 N. E. 2d 282, and People v. Burke, 243 App. Div. 83, 276 N. Y. S. 402. We have examined all the cases cited by defendant but must decline to follow them. The apparent ra-

tionale of those and other cases which reach a conclusion contrary to that we have above expressed seems to us to be confounded of confusion and artificialities, and seems not to have considered certain basic concepts and teachings which we deem important. Some opinion writers have variously defined obscenity as a "Function of many variables" and also as, "The present critical point in the compromise between candor and shame at which the community may have arrived here and now." Another writer has stated that the word "obscene" is not susceptible of exact definitions because "Such intangible moral concepts as it purports to connote vary in meaning from one time to another." It is difficult to follow the reasoning of some of the cases cited by defendant.

In any event, we live today in a clothed civilization. The people of Missouri exercised the State's sovereign police power in enacting this statute, and we may not by judicial fiat invade the legislative function and rule that the people of Missouri did not mean what this unambiguous statute so exactly and solemnly declares, and in so ruling be untrue to our responsibility and to the public trust reposed in us.

Defendant next contends that the court erred in excluding the offered testimony of a certain college professor, who held certain degrees in psychology and philosophy, that the instant publications were not obscene, lewd, licentious, lascivious, indecent, and of an indecent, immoral and scandalous character. Defendant asserts that the professor witness was qualified as an expert in this field and asserts also that the testimony rejected was within the proper scope of expert testimony in this case. We rule that the trial court did not err in excluding the offered testimony.

We need not here consider or discuss the claimed qualifications of the witness for we must rule that the subject matter of the excluded testimony was not

within the proper scope of any expert testimony in this case. Under the instant facts the learned trial court had the responsibility under the law of ruling whether the publications came within the prohibitions of the statute, and he knew far better than any lay professor when, under the statute controlling judicial decisions, the publications were in fact and in law obscene and immoral. Section 563.280 does not define the words "obscene, lewd, licentious, indecent or lascivious * * * immoral or scandalous" but those words are themselves descriptive. They are words of common usage and most every person (and certainly the trial judge) understands their meaning. The trial judge was capable of applying their legal and lay meaning to these publications. No college professor or other expert was required to determine whether these publications are obscene and offensive to good morals, or might arouse lustful desires, or encourage commission of crime by the susceptible man or woman, boy or girl. The issue being tried was whether the instant publications were obscene and immoral and while defendant was entitled to prove any fact legitimately bearing upon such issue, defendant could not substitute the claimed expert witness's opinion thereon for the ultimate fact which the trial court was compelled to find and rule. This contention must be denied. McAnany v. Henrici, 238 Mo. 103, 141 S. W. 633; People v. Muller, 96 N. Y. 408.

We come now to defendant's contention that the statute in question here is too vague and indefinite, and fails to set up an ascertainable standard of guilt, and that it therefore contravenes both the State and Federal due process provisions. Missouri Constitution, Article I, Section 10, and the Fourteenth Amendment of the Federal Constitution. The exact contention, simply stated, is that the statute is so void of

meaning that no person, even one who desired to obey the statute, could fairly be sure whether he was doing that which the statute prohibited.

The instant Information charges that defendant possessed, with intent to sell and circulate, "certain obscene, indecent, scandalous and immoral publications, to wit, 648 Publications entitled 'Solaire Universalle De Nudisme' and 195 entitled 'Sunshine and Health.'" etc. Defendant now specifically contends that the statute is so vague and indefinite as to provide no ascertainable standard of guilt because the statute includes therein the words, "indecent, immoral or scandalous." Defendant does not contend that the statute is vague or indefinite because it uses the words "obscene, lewd, licentious or lascivious."

It may be conceded that a crime must be defined with sufficient definiteness that there be ascertainable standards of guilt to inform those subject thereto as to what conduct will render them liable to punishment thereunder. Ex parte Hunn, 357 Mo. 256, 207 S. W. 2d 468; Winters v. People of State of New York, 333 U. S. 507, 68 S. Ct. 665, 92 L. Ed. 840.

The words "indecent, immoral or scandalous" as used in this statute, and particularly as used therein in connection with the words "obscene, lewd, licentious and lascivious," are not words of hidden or obscure or uncertain meaning. Those words are not technical terms of the law. The word "indecent" is a common word of common understanding. It has been defined to mean unfit to be seen or heard; immodest; gross; obscene; offending against modesty and less than immodest; that which would arouse lewd or lascivious thoughts in the susceptible. People v. Eastman, 188 N. Y. 478, 81 N. E. 459, 460; Wood v. State ex rel. Boykin, 45 Ga. App. 783, 165 S. E. 908, 911; Duncan v. United States, 9 Cir., 48 F. 2d 128, 132; Webster's

New International Dictionary; United States v. Chesman, C. C., 19 F. 497; United States v. Clarke, D. C., 38 F. 500. The word "immoral" is likewise a word of common understanding. It means hostile to the welfare of the general public; morally evil, impure, vicious or dissolute; licentious misconduct. Jones v. Poole, 62 Ga. App. 309, 8 S. E. 2d 532; Warkentin v. Kleinwachter, 166 Okl. 218, 27 P. 2d 160; People ex rel. First Nat. Pictures v. Dever, 42 Ill. App. 1; United States v. One Book Entitled "Contraception," D. C., 51 F. 2d 525. The word "scandalous" as used in the statute in connection with the words "obscene, lewd, licentious, lasciyious, immoral" means shocking to decency or propriety, offensive, disreputable. Webster gives as synonyms of "scandalous," the words detestable, base, vile, shameful. Polson v. Polson, 140 Ind. 310, 39 N. E. 498, 499; In re Riverbank Canning Co., 95 F. 2d 327, 25 C. C. P. A., Patents, 1028.

The words of the statute "obscene, lewd, licentious, indecent, lascivious, immoral, scandalous" are used therein as descriptive of the character of the publication prohibited to be possessed with intent to sell or circulate, are all synonymous and of similar meaning. Those descriptive words are neither vague nor indefinite. They are words of common usage and understanding, and as used in this statute, and in law, they have a meaning understood by all. Those words set out within this statute a clear and ascertainable standard of guilt which is readily to be comprehended. The statute as a whole, when read and considered in its entire text and subject matter, is so clear and unequivocal and so understandable and certain that no person of common intelligence would be compelled to guess at its meaning and purpose. The standard of guilt is obvious from a reading of the statute. In any event, statutes of this character, enacted for the clear

purpose of eliminating certain evils and certain crimes against the person which publications of this character unquestionably tend to promote, are allowed a degree of permissible uncertainty in the use of such words as obscene, lewd, lascivious, indecent, immoral and scandalous. Winters v. People of State of New York, supra. Such allowance of uncertainty stems from the fact that the above words are well understood by everyone through long and continued use in the criminal law.

But we rule that the statute clearly limits punishment to possession with intent to sell or circulate publications which are obscene, indecent, immoral, scandalous, lewd, licentious or lascivious, as those words were formerly used and have always been understood.

In Fox v. State of Washington, 236 U. S. 273, 35 S. Ct. 383, 384, 59 L. Ed. 573, the United States Supreme Court considered a statute of the State of Washington directed against printed matter tending to encourage and advocate disrespect for law. It was there contended that the statute was too vague for a criminal law in that it contained no ascertainable standards of guilt. Mr. Justice Holmes, writing the unanimous opinion of the Court, inter alia, said: "If the statute should be construed as going no farther than it is necessary to go in order to bring the defendant within it, there is no trouble with it for want of definiteness. See Nash v. United States, 229 U. S. 373, 33 S. Ct. 780, 57 L. Ed. 1232; International Harvester Co. [of America] v. [Commonwealth of] Kentucky, 234 U. S. 216, 34 S. Ct. 853, 58 L. Ed. 1284."

Defendant's contention that the statute in question here is too vague and indefinite and fails to set up an ascertainable standard of guilt must be denied.

* * * * * * *

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969.

No. 225.

WILLIAM MARCUS ET AL.,
Appellants,

vs.

SEARCH WARRANT OF PROPERTY AT 104 EAST TENTH STREET, KANSAS CITY, MISSOURI, ET AL.,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF MISSOURI, EN BANC.

BRIEF FOR THE APPELLEES.

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BRIEF FOR THE APPELLEES.

SUMMARY OF ARGUMENT.

I.

This Court should not retain jurisdiction or should affirm the decision of the Supreme Court of Missouri, for the reason that the statutory scheme here in question is in all essential elements constitutionally similar to the statutory scheme of New York approved by this Court in the case of **Kingsley Books v. Brown**, 354 U.S. 436, 1 L. Ed. 2d 1469, 77 S. Ct. 1325.

II.

The application of the Missouri statutes authorizing the seizure of obscene literature and an expeditious judicial determination of the fact issue of whether or not such publications are obscene, does not constitute a previous restraint upon freedom of speech or press and appellants' constitutional rights are in no way invaded by such proceedings.

III.

The issue of whether or not the publications in question are obscene has not been presented to this Court for review and, therefore, appellants' complaints in Point III of their brief as to the propriety of the test for obscenity used by the trial court is not before this Court for determination. In any event, the Supreme Court of Missouri, by its construction of its previous holdings, pointed out that the test used was in fact proper and in accordance with the opinion of this Court in **Roth v. United States,** 354 U.S. 376, 1 L. Ed. 2d 1498, 77 S. Ct. 1304. In any event, the Supreme Court of Missouri itself passed upon the fact issue of obscenity and had the exhibits before it. It applied the test for obscenity approved in the **Roth** case, supra, and appellants cannot now be heard to complain on such score.

ARGUMENT.

I.

This Court should not retain jurisdiction of this appeal because of the lack of any substantial federal question or the decision of the Supreme Court of Missouri should be affirmed on the authority of Kingsley Books v. Brown, 354 U.S. 436, 1 L. Ed. 2d 1469, 77 S. Ct. 1325, and Roth v. United States, 354 U.S. 476, 1 L. Ed. 2d 1498, 77 S. Ct. 1304.

In the case at bar we are dealing with obscene publications; books, magazines, pamphlets and photographs. The issue of whether or not these publications are in fact obscene was presented to the trial court and to the Supreme Court of Missouri, and these courts found the issue of obscenity adversely to the contentions of appellants. The appellants have expressly refrained from presenting this fact issue of obscenity to this Court. See appellants' brief, page 3, footnote 1. Thus, for the purposes of this appeal, we can consider that the fact issue as to obscenity has been settled and that the publications in question are in fact obscene.

Both the trial court and the Supreme Court of Missouri had these publications before them and carefully examined each of the publications and, after applying the tests for obscenity as approved by the Supreme Court of the United States, determined that the publications in question, and each of them, were obscene.

Appellants, by this appeal, have not presented this fact issue of obscenity to this Court and, therefore, the only issue before this Court is the constitutionality of Missouri's statutory scheme for preventing the distribution of such obscene publications to her citizens.

It is submitted that this issue has already been decided by this Court, adversely to the claim of appellants, in the case of **Kingsley Books v. Brown,** 354 U.S. 436, 1 L. Ed. 2d 1469, 77 S. Ct. 1325.

The statutory scheme of the State of New York, approved by this Court in the **Kingsley** case, supra, and Missouri's statutory scheme are essentially similar. The differences are of degree not of kind, and the reasoning and authorities contained in the opinion of this Court in the Kingsley case require a holding that Missouri's statutory scheme is likewise constitutional.

Missouri's statutory scheme operates in rem—against the publications, whereas New York's statute operates in personam—against the seller. In New York a complaint is filed in court against the seller of allegedly obscene publications and a temporary injunction pendente lite restrains the seller from distributing such publications until the issue of obscenity is judicially determined by expeditious proceedings. If the publications are found by the court to be obscene, the seller is permanently enjoined from selling them (or other copies of the same publication which he may thereafter obtain), and he is required to deliver them up for destruction (or they will be seized and destroyed). Such judicial proceedings are not limited to one publication offered for sale by the seller, but one case may apply to any number of publications held for distribution by the seller. In the Kingsley case there were involved fourteen different booklets, under the general title of "Nights of Horror."

In Missouri a search warrant is issued by a court on complaint, if the court finds reasonable grounds for such complaint or the complaint is upon personal knowledge of the person who executes it (**Section 542.380**, R.S. Mo.

1949, and **Supreme Court Rule** 33.01). The search warrant directs the officer who executes it to seize the allegedly obscene publications in the hands of the seller and return the publications into court. Notice is given to the seller from whom the publications were seized and an expeditious judicial determination of the issue of obscenity is had. If the publications are found not to be obscene they are returned to the seller. If the publications are found to be obscene they are ordered destroyed or retained by the sheriff for use in evidence and then destroyed.

Missouri places no restrictions on the seller except that the particular publications seized under the search warrant are taken from his possession pending the expeditious judicial determination of the issue of obscenity. The seller is free to continue selling any other publications or copies that he may possess.

Neither New York nor Missouri exert any prior restraint on publication. Both act only after publication and in an attempt to stop distribution of obscenities and thus protect their citizens from the admitted evils flowing from such dissemination of obscene publications. Such evils have long and almost universally been recognized as is pointed out by this Court in **Roth v. United States,** 354 U.S. 476, 1 L. Ed. 2d 1498, 77 S. Ct. 1304, in connection with its specific holding that "obscenity is not within the area of constitutionally protected speech or press."

Thus, Missouri is attempting to protect its citizens from the evils attendant to the distribution of obscenity which is not constitutionally protected speech or press, and in doing so has adopted a statutory scheme which is not constitutionally different from that of New York approved by this Court in **Kingsley Books v. Brown**, supra.

It is, therefore, submitted that this case does not present a substantial federal question and that this Court should not retain jurisdiction of this appeal or that the decision of the Supreme Court of Missouri should be affirmed on the basis of the foregoing authorities.

II.

The Missouri statutes do not impose an unconstitutional prior restraint on freedom of speech or press.

In Point No. II of appellants' brief, it is contended that the Missouri statutes here in question impose an unconstitutional prior restraint on the freedom of speech or press. This position of appellants misconceives the attack of the statutes and the scope of the constitutional protection of speech and press. The Missouri statutes do not, in fact, provide any previous restraint. The statutes come into play only after the magazine, book, etc., has been published and has been introduced into a stream of commerce which leads to the ultimate recipient, i. e., the reader. There is no previous license or censorship or requirement for administrative approval before a publication may be published or distributed. The Missouri statutes merely operate to remove obscene matter from the stream of commerce before it can reach the reader and do its damage.

The First Amendment to the United States Constitution, as made applicable to the states through the Fourteenth Amendment to the United States Constitution, does not place an absolute prohibition upon all prior restraints. This is most graphically illustrated by the holding of this Court in the very recent case of **Times Film Corporation v. City of Chicago**, No. 34, October Term, 1960, decided January 23, 1961. It has repeatedly been held by this Court that the constitutional protection against prior restraint is

not absolute. See such cases as **Near v. Minnesota**, 283 U.S. 697, 75 L. Ed. 1357, 51 S. Ct. 625, and **Kingsley Books v. Brown**, 354 U.S. 436, 1 L. Ed. 2d 1469, 77 S. Ct. 1325. It has further been specifically held by this Court in **Roth v. United States**, 354 U.S. 476, 1 L. Ed. 2d 1498, 77 S. Ct. 1304, that obscene publications such as those with which we are dealing here are not within the area of constitutionally protected speech or press. This holding, of course, had been forecast by a long line of supreme court decisions beginning with **Near v. Minnesota**, 283 U.S. 697, 75 L. Ed. 1357, 51 S. Ct. 625.

In **Kingsley Books v. Brown**, 354 U.S. 436, 1 L. Ed. 2d 1469, 77 S. Ct. 1325, it was specifically pointed out that the law does not require a state to wait until the individual reader has received the obscene magazine and it has done its damage before the state can act to protect its citizens from the evils of pornography, obscenity, lewdness, and "filth for filth's sake." The state is not limited to proceeding only by criminal prosecution for the sale of obscene literature. It may by proper statutory procedure intervene to protect its citizens from the distribution of such obscenity.

In the case at bar the speech has already been spoken; the books, magazines, etc., have already been published. Missouri places no prior restraint on such speech or publication but only acts after such speech or publication, in an attempt to limit the dissemination thereof and protect its citizens from the damage done by such dissemination.

Appellants claim that a bookseller should have *the right* to circulate his material subject only to subsequent restraint by criminal prosecution. Appellants make the flat statement that the distributor has the right to distribute obscenity if he is willing to risk criminal prosecution and imprisonment therefor. It seems apparent from this

bold assertion that it is appellants' position that every individual in the chain of distribution of obscenity and pornography has an absolute right to be allowed to make their profit by selling such filth, and that the state is powerless to act until after they have made their profit and then the state may only act by criminal prosecution. Appellants contend that it is only after such obscene magazines have been sold to the ultimate consumer, that is, the individual reader, and they have performed their evil function that the state can act. Appellants would have this Court hold that the state is powerless to prevent the damage from such obscene literature, but that it must stand aside with hands tied until the damage has been done and then can move only by way of criminal prosecution. It is apparent from appellants' brief that the appellants think that it is economically profitable for them to run the risk of possible criminal prosecution in order to make their profits from the selling of obscene literature. It is respectfully and urgently submitted that the law does not thus render the state impotent to protect its citizens from the evils of obscenity, nor does the law clothe the purveyors of pornography with such a protective cloak to guarantee their profits. This Court has so held in **Kingsley Books v. Brown**, supra, and it is submitted that a like holding should result in the case at bar.

It should be pointed out that action by Missouri under the statutory scheme here in question affects only publications in being that are seized under the search warrant. It has no effect whatsoever upon any future publications or upon the activities of the bookseller except only as to his ability to sell the publications that have been seized.

The New York statutes approved by this Court in **Kingsley Books**, supra, provided for a temporary injunction against the selling of the publications in question

pending the judicial determination of the issue of obscenity. Appellants make some issue of the possibility of the seller continuing to sell under such injunction. It is submitted that this is not in fact in issue in the case at bar, and that there is no substantial difference from the injunction under the New York statute and the taking of the publications in question before the court and out of the possession of the seller under the Missouri statute. If anything, the New York statute is harsher because all of his interim actions are enjoined, whereas, the Missouri seller is only affected as to the particular copies of the publications which have been seized. He is free to continue selling other copies that he may possess or acquire. The Missouri statutes require a showing before a court will issue a search warrant for allegedly obscene matter. The New York procedure is commenced by complaint on the discretion of the officials named in the statute. The Missouri search warrants direct the person executing such warrant to seize obscene publications at the named place of business of the seller. The New York complaint is directed against the seller and the interim injunction prohibits him from selling any and all publications named, be that one or many. Both Missouri and New York provide for expeditious judicial determination of the issue of obscenity. The New York statute requires a hearing within one day and a decision within two days after the hearing. The Missouri statute requires a hearing not less than five days after seizure and not more than twenty. While there is a slight difference in timing, it is submitted that this difference is not of substance and, in fact, appellants make no complaint about this difference as to time.

Appellants complain that under the Missouri procedure the officer who executes the search warrant directing the seizure of obscene publications may seize a publication

which is not obscene. We are here dealing with the activities of human beings and there is, of course, always room for a mistake. Likewise, and with equal force, it could be said that under the New York statute the officials might complain against publications which were not in fact obscene and the seller thereof might be prohibited from selling such publications pending judicial determination of the issue of obscenity. It is, for this very reason, that judicial determination of the question of whether or not the publication is obscene is provided for by the statutes. If there were no possibility of complaining against in New York, or seizing in Missouri, a publication which was not obscene, there would be no need for a judicial hearing on the issue of obscenity. It is submitted that the Missouri procedure for judicial determination of the question of obscenity gives adequate protection to the constitutional rights of the seller in the same manner and to the same extent as was the case under the New York statutes approved by this Court in the **Kingsley** case.

Appellants complain that under the Missouri statute there could be indiscriminate seizure at the whim of any police officer, and that the officials of Missouri might in some other case seize the whole stock in trade of some bookseller because one book in such stock was possibly obscene. The answer to this, of course, is that this is not the case at bar. Further, action in Missouri is not taken at the whim of some police officer but is only taken after a showing is made to a court and the court determines that the circumstances justify the issuance of a search warrant; such search warrant does not authorize the seizure of all of the stock in trade of a bookseller but is limited specifically to those publications which are obscene, lewd, licentious, indecent or lascivious, or of an indecent, immoral or scandalous character. Thus, it appears that the Missouri statute

limits its force to those materials which are without the protection of the freedom of speech and press clause of the First Amendment of the United States Constitution, and that it accords the seller notice and hearing and complete satisfaction of the requirements of due process.

We are not here dealing with a threat of prosecution either with or without knowledge on the part of the defendant, as was condemned by this Court in **Smith v. California,** 361 U.S. 147, 4 L. Ed. 2d 205, 80 S. Ct. 215, or with any scheme designed to induce self-censorship. Likewise, there is no semblance of any requirements for licensing or censorship. The scope of the Missouri statute is strictly limited to operating upon the publications, themselves, which are thought to be obscene and an expeditious judicial determination of the question of obscenity is provided with full protection to the rights of the seller.

It is therefore submitted, on the authority of the foregoing, that the Missouri statutes do not impinge upon the constitutional protection of freedom of speech and press as found in the First Amendment to the United States Constitution and as made applicable to the state by the Fourteenth Amendment to the United States Constitution. It is, therefore, respectfully suggested that the decision of the Supreme Court of Missouri in this case should be affirmed.

III.

No constitutional right of appellants was infringed by the test for obscenity applied by the Missouri courts.

In Point No. III of appellants' brief it is complained that the trial court applied an unconstitutionally restricted test in making its determination that the magazines in question were, in fact, obscene. It is submitted that this issue is not before the court in the case at bar.

As has heretofore been pointed out, appellants have specifically refrained from presenting to this Court the issue as to whether or not the publications in question were, in fact, obscene. Under such circumstances the question of the test used by the trial court in determining the fact issue of obscenity is not before this Court.

Likewise, the question of the propriety of the test used by the trial court was not actually before the Supreme Court of Missouri. This case was submitted in the trial court to the Judge, sitting without a jury, and under said circumstances the Missouri Supreme Court reviewed the case de novo on both the law and the evidence. The Supreme Court of Missouri, as is graphically shown by its opinion, applied the test for obscenity as set out and approved by this Court in **Roth v. United States**, 354 U.S. 376, 1 L. Ed. 2d 1498, 77 S. Ct. 1304. The Missouri Supreme Court set out the test as follows: "whether to the average person, applying contemporary community standard, the dominant theme of the material taken as a whole appeals to prurient interests." On the basis of this test the Supreme Court of Missouri examined the exhibits which were before it and concluded, independently and apart from the action of the trial court, that they were in fact obscene. The Missouri Supreme Court pointed out that the opinion filed gratuitously by the trial court was in no way binding on the appellate court which reviewed on both questions of law and questions of fact. The appeal was from the judgment of the trial court, not from the trial court's opinion. The pertinent part of said judgment is as follows (R. 92, 93):

> "State's Exhibits listed and described in Schedule A attached hereto and made a part hereof, and all copies thereof before this Court pursuant to the oral stipulation of counsel heretofore entered into in open court on the 23rd day of October, 1957, are hereby declared to have been kept for the purpose of public sale, distri-

bution and circulation, and are further declared obscene, lewd, licentious, indecent, lascivious, immoral and scandalous within the meaning and intent of **Missouri Revised Statutes**, 1949, Section 542.380. Said exhibits, and all copies thereof before this Court, shall be retained by the Sheriff of Jackson County, Missouri, or by his deputies, as necessary evidence for the purpose of possible criminal prosecution or prosecutions, and, when such necessity no longer exists, said Sheriff, or his deputies, shall publicly destroy the same by burning within thirty days thereafter."

Thus, regardless of the test used by the trial court, the Supreme Court of Missouri applied the proper test and concluded that the publications in question were, in fact, obscene. If appellants' complaints as to the test used by the trial court were sustained appellants would apparently require the Supreme Court of Missouri to vacate the order of the trial court and remand the case to the trial court for the purpose of entering the exact same judgment as the trial court had already entered. Even if it be conceded for the purpose of argument that the test applied by the trial court was erroneous, the result reached by the trial court was correct as found by the Supreme Court of Missouri by applying correct tests for obscenity and, therefore, it would be a useless formality to reverse the holding of the trial court only to direct the trial court to again enter the same judgment.

Even if we were to consider on the merits the contentions of appellants attacking the test used by the trial court, such contentions are without merit. The Supreme Court of Missouri, in its opinion, pointed out that the trial court had, in fact, used proper tests for obscenity and that such tests conformed to the requirements of the opinion of this Court in **Roth v. United States**, supra.

Appellants contend that the trial court relied exclusively on **State v. Becker**, 364 Mo. 1079, 272 S.W.2d 238. This is not correct, the Becker case was only one of several citations of authority contained in the trial court's opinion. In any event, the Supreme Court of Missouri pointed out specifically that the test promulgated in the **Becker** case was found in the following language:

> "These questions have been considered and tested objectively as to the effect of these publications in their entirety, upon persons of average human instincts." (R. 110).

Thus, even if we assume that the gratuitous opinion of the trial court is in some way in issue on this appeal, the Supreme Court of Missouri has construed its previous opinion in the Becker case as setting forth a test for obscenity which meets all the requirements of the test approved by the Supreme Court of the United States in **Roth v. United States**, supra.

The real complaint of appellants seems to be that the trial court in its opinion did not use the exact language that was used by this Court in the **Roth** case, when speaking of the test to be used to determine the fact issue of obscenity.

It therefore appears that there is no substantive merit in appellants' complaint concerning the opinion of the trial court, and that such issue is not properly before this Court for consideration.

CONCLUSION.

It is, therefore, on the basis of the foregoing, respectfully submitted that the decision of the Supreme Court of Missouri should be in all things affirmed.

Respectfully submitted,

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No. 225.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1960.

WILLIAM MARCUS, TITLE NEWS COMPANY, HOMER SMAY, KANSAS CITY NEWS DISTRIBUTORS, JACK GORDON, HARVEY HAMMER, TOWN BOOK STORE, RUBACK'S NEWS STAND, JACK K. RAYBURN, and TED'S NEWS SHOP,

Appellants,

v.

SEARCH WARRANT OF PROPERTY AT 104 EAST TENTH STREET, KANSAS CITY, MISSOURI, SEARCH WARRANT OF PROPERTY AT 3105 EUCLID, KANSAS CITY, MISSOURI, SEARCH WARRANT OF PROPERTY AT 1 EAST THIRTY-NINTH STREET, KANSAS CITY, MISSOURI, SEARCH WARRANT OF PROPERTY AT 123 EAST TWELFTH STREET, KANSAS CITY, MISSOURI, SEARCH WARRANT OF PROPERTY AT 5 WEST TWELFTH STREET, KANSAS CITY, MISSOURI, and SEARCH WARRANT OF PROPERTY AT 221 EAST TWELFTH STREET, KANSAS CITY MISSOURI,

Appellees.

On Appeal from the Supreme Court of Missouri, En Banc.

REPLY BRIEF FOR APPELLANTS.

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No. 225.

IN THE

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WILLIAM MARCUS, TITLE NEWS COMPANY, HOMER SMAY, KANSAS CITY NEWS DISTRIBUTORS, JACK GORDON, HARVEY HAMMER, TOWN BOOK STORE, RUBACK'S NEWS STAND, JACK K. RAYBURN, and TED'S NEWS SHOP,

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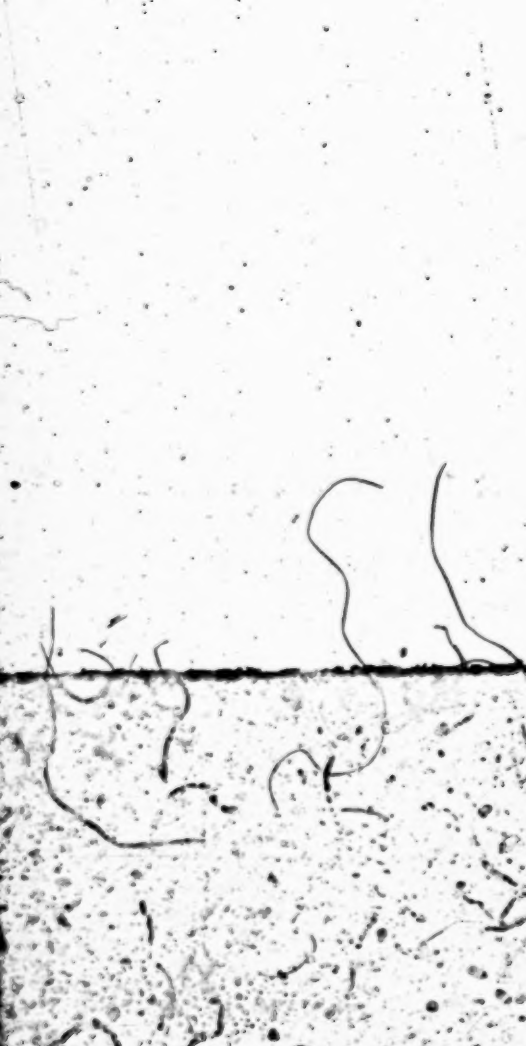
Appellees.

On Appeal from the Supreme Court of Missouri, En Banc.

REPLY BRIEF FOR APPELLANTS.

ARGUMENT.

Appellees argue that Missouri requires a showing before a court will issue a search warrant, contending that a search warrant issues for alleged obscene material only



if a court finds reasonable grounds after the filing of a complaint. In practice this condition precedent affords no safeguard for the protection of free expression. We do not have a case in which publications have been displayed to a court which has actually made a preliminary finding that there is probable cause to believe that particular publications are obscene. As the court below found, the search warrants were issued under the provisions of Missouri Court Rule 33.01 which provides that a judge shall issue a search warrant if a verified complaint is filed stating as a positive fact that personal property whose seizure is authorized by state statute is kept at a particular location. The only showing necessary was alleging positively but generally in a complaint the conclusion that these were obscene publications at various newsstands. There was no attempt to otherwise allege facts indicating obscenity. Missouri procedure denotes this as sufficient probable cause to support a seizure (R. 124-125), and directs the court to substitute the opinion of the affiant, a peace officer in this case, that the publications to be seized are unfit for circulation. The court in no other manner finds probable cause from facts that any particular publication may be obscene.*

Appellees further contend that the search warrants were valid because they only authorized the seizure of "obscene" publications. They admit that publications which are not obscene may be seized but assert this is the reason for subsequent judicial determination of the character of the publications. This Court has held that obscenity provides a clear standard sufficient to authorize the subsequent restraints imposed following an adversary procedure with all trial safeguards in a criminal or injunction pro-

* Even the right to seize drugs prior to a hearing under the Food and Drug Act probably requires a finding of probable cause based upon specific facts. *See Ewing v. Mytinger & Casselberry*, 339 U. S. 594

ceeding. But the fact that obscenity furnishes a sufficient standard to authorize condemnation after trial does not mean that such a test is clear enough to authorize a police officer to seize such publications which he thinks fall within that category. A standard which is definite for a court operating within the framework of judicial procedure may be vague and indefinite when placed in another framework. Appellees consider the possibility of error to be unimportant. If publications may be seized under limited circumstances, which we do not concede, the margin of error must be reduced. A shotgun may not be used where a rifle will suffice. We do not have a case where a search warrant directs the seizure from a black market operator of photographs depicting acts of perversion or sexual relations. A policeman who is a ministerial officer would be able to execute such a warrant without the exercise of discretion. In the instant case the policeman had to make an on-the-spot determination of whether to the average person applying contemporary community standards the dominant theme of each publication taken as a whole appealed to prurient interests. A policeman, part of the prosecuting arm, is notably unfit to make such a judgment.

In **Times Film Corp. v. City of Chicago,** 81 S. Ct. 381, this Court decided that an exhibitor who applied for a permit to show a motion picture but refused to submit the film for examination was neither entitled to injunctive relief ordering the issuance of the permit without submission of the film, nor to relief restraining city officials from interfering with the exhibition of the picture. This court specifically pointed out that it was only dealing with motion pictures "in the context of the broadside attack" presented by the record. It upheld the city's claim to protect its people against the dangers of obscenity in the public exhibition of motion pictures, finding that the capacity for evil of the particular medium of communica-

tion is relevant in determining the scope of community control. Appellees' position is that the Times Film case indicates that there is no absolute prohibition on all prior restraints. It recognizes the uniqueness of motion pictures. They do not contend that the controls which a state may impose upon motion pictures are co-extensive to those allowable for publications such as magazines, books and newspapers. They apparently recognize the inherent evil to free expression in any attempt to subject such publications to the vast army of censors which would be required to restrain them by similar ordinances and statutes. They impliedly concede that there is a smaller capacity for evil in such items which are generally read in private rather than exhibited publicly before mixed audiences. Finally, appellees must recognize that historically the First Amendment was aimed in large measure against the evil of restraint against printed matter.

We deny that we are here dealing with obscene publications and that the fact issue of obscenity has been settled. It is appellants' position that the courts below have not determined that the publications were obscene under the constitutional standard required for such a determination. The question of the propriety of the test used by the trial Court is in issue. The Missouri Supreme Court did not decide that the publications before it were in fact obscene. That Court only decided that the trial Court's decision was not clearly erroneous. This is not an independent determination that the publications in question were obscene. Appellees ignore the issue as to whether the Missouri decision in **State v. Becker**, 364 Mo. 1079, 272 S. W. 2d 283 actually adopted the susceptible person test of **Regina v. Hicklin** (1868), L. R. 3 Q. B. 360, rather than an average person test.

We do not quarrel with the right of the Missouri Supreme Court to construe its previous opinion. But it may

not deny to a particular case and to particular publications the federal right to have the publications judged in accordance with proper standards.

This issue of the character of the publications was not made a major question in the case because it would involve this Court in the task of examining 100 separate publications. We do not think the Court need reach this issue in view of the other questions presented.

CONCLUSION.

For the reasons set out above and for those set forth in appellants' original brief, the judgment below should be reversed.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

No. 225.—October Term, 1960.

William Marcus, et al., Appellants, v. Search Warrants of Property at 104 East Tenth Street, Kansas City, Missouri, et al.	On Appeal From the Supreme Court of Missouri.

[June 19, 1961.]

Mr. Justice Brennan delivered the opinion of the Court.

This appeal presents the question whether due process under the Fourteenth Amendment was denied the appellants by the application in this case of Missouri's procedures authorizing the search for and seizure of allegedly obscene publications preliminarily to their destruction by burning or otherwise if found by a court to be obscene. The procedures are statutory, but are supplemented by a rule of the Missouri Supreme Court.[1] The warrant for search for and seizure of obscene material issues on a sworn complaint filed with a judge or magistrate.[2] If the complainant states "positively and not

[1] These procedures are separate from and in addition to the State's criminal statutes. See *State* v. *Mac Sales Co.*, 263 S. W. 2d 860. The criminal statutes are Mo. Rev. Stat. §§ 563.270, 563.280, 563.290; see also § 563.310.

[2] Mo. Rev. Stat., § 542.380, in pertinent part provides:

"Upon complaint being made, on oath, in writing, to any officer authorized to issue process for the apprehension of offenders, that any of the property or articles herein named are kept within the county of such officer, if he shall be satisfied that there is reasonable ground for such complaint, shall issue a warrant to the sheriff or any constable of the county, directing him to search for and seize any of the following property or articles:

"(2) Any of the following articles, kept for the purpose of being sold, published, exhibited, given away or otherwise distributed or

upon information or belief," or states "evidential facts from which such judge or magistrate determines the existence of probable cause" to believe that obscene material "is being held or kept in any place or in any building," "such judge or magistrate shall issue a search warrant directed to any peace officer commanding him to search the place therein described and to seize and bring before such judge or magistrate the personal property therein described." [3] The owner of the property is not afforded a

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circulated viz.: obscene, lewd, licentious, indecent or lascivious books, pamphlets, ballads, papers, drawings, lithographs, engravings, pictures, models, casts, prints or other articles or publications of an indecent, immoral or scandalous character, or any letters, handbills, cards, circulars, books, pamphlets or advertisements or notices of any kind giving information, directly or indirectly, when, where, how or of whom any of such things can be obtained." These procedures also govern seizure and condemnation of gambling paraphernalia, contraceptive devices, and tools and other articles used to manufacture or produce such items. Fraudulent, forged, and counterfeited writings and other articles, and the instruments used to make them, are also declared contraband and subject to seizure. § 542.440.

[3] Missouri Supreme Court Rule 33.01 of the Rules of Criminal Procedure provides:

"(a) If a complaint in writing be filed with the judge or magistrate of any court having original jurisdiction to try criminal offenses stating that personal property . . . the seizure of which under search warrant is now or may hereafter be authorized by any statute of this State, is being held or kept at any place or in any building . . . within the territorial jurisdiction of such judge or magistrate, and if such complaint be verified by the oath or affirmation of the complainant and states such facts positively and not upon information or belief: or if the same be supported by written affidavits verified by oath or affirmation stating evidential facts from which such judge or magistrate determines the existence of probable cause, then such judge or magistrate shall issue a search warrant directed to any peace officer commanding him to search the place therein described and to seize and bring before such judge or magistrate the personal property therein described.

"(b) The complaint and the warrant issued thereon must contain

hearing before the warrant issues; the proceeding is *ex parte*. However, the judge or magistrate issuing the warrant must fix a date, not less than five nor more than 20 days after the seizure, for a hearing to determine whether the seized material is obscene.[4] The owner of the material may appear at such hearing and defend against the charge.[5] No time limit is provided within which the judge must announce his decision. If the judge finds that the material is obscene, he is required to order it to be publicly destroyed, by burning or otherwise; if

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a description of the personal property to be searched for and seized and a description of the place to be searched, in sufficient detail and particularity to enable the officer serving the warrant to readily ascertain and identify the same."

[4] Mo. Rev. Stat. § 542.400 provides:

"The judge or magistrate issuing the warrant shall set a day, not less than five days nor more than twenty days a he date of such service and seizure, for determining whether such property is the kind of property mentioned in section 542.380, and shall order the officer having such property in charge to retain possession of the same until after such hearing. Written notice of the date and place of such hearing shall be given, at least five days before such date, by posting a copy of such notice in a conspicuous place upon the premises in which such property is seized and by delivering a copy of such notice to any person claiming an interest in such property, whose name may be known to the person making the complaint or to the officer issuing or serving such warrant, or leaving the same at the usual place of abode of such person with any member of his family or household above the age of fifteen years. Such notice shall be signed by the magistrate or judge or by the clerk of the court of such judge."

[5] Mo. Rev. Stat. §542.410 provides:

"Rights of property owner.—The owner or owners of such property may appear at such hearing and defend against the charges as to the nature and use of the property so seized, and such judge or magistrate shall determine, from the evidence produced at such hearing, whether the property is the kind of property mentioned in section 542.380."

he finds that it is not obscene, he shall order its return to its owner.[6]

The Missouri Supreme Court sustained the validity of the procedures as applied in this case. 334 S. W. 2d 119. The appellants brought this appeal here under 28 U. S. C. § 1257 (2). We postponed consideration of the question of our jurisdiction to the hearing of the case on the merits. 364 U. S. 811. We hold that the appeal is properly here, see *Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U. S. 282, and turn to the merits.

Appellant, Kansas City News Distributors, managed by appellant, Homer Smay, is a wholesale distributor of magazines, newspapers and books in the Kansas City area. The other appellants operate five retail newsstands in Kansas City. In October 1957, Police Lieutenant Coughlin of the Kansas City Police Department Vice Squad was conducting an investigation into the distribution of allegedly obscene magazines. On October 8, 1957, he visited Distributor's place of business and showed Smay a list of magazines. Smay admitted that his company distributed all but one of the magazines on the list. The following day, October 9, Lieutenant Coughlin visited the five newsstands and purchased one magazine

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[6] Mo. Rev. Stat. § 542.420 provides:

"Disposition of property.—If the judge or magistrate hearing such cause shall determine that the property or articles are of the kind mentioned in section 542.380, he shall cause the same to be publicly destroyed, by burning or otherwise, and if he find that such property is not of the kind mentioned, he shall order the same returned to its owner. If it appears that it may be necessary to use such articles or property as evidence in any criminal prosecution, the judge or magistrate shall order the officer having possession of them to retain such possession until such necessity no longer exists, and they shall neither be destroyed nor returned to the owner until they are no longer needed as such evidence."

at each.[7] On October 10 the officer signed and filed six sworn complaints in the Circuit Court of Jackson County, stating in each complaint that "of his own knowledge" the appellant named therein, at its stated place of business, "kept for the purpose of [sale] . . . obscene . . . publications . . . ." No copy of any magazine on Lieutenant Coughlin's list, or purchased by him at the newsstands, was filed with the complaint or shown to the circuit judge. The circuit judge issued six search warrants authorizing, as to the premises of the appellant named in each, "any peace officer in the State of Missouri . . . [to] search the said premises . . . within ten days after the issuance of this warrant by day or night, and seize . . . [obscene materials] and take same into your possession . . . ."

All of the warrants were executed on October 10, but by different law enforcement officers. Lieutenant Coughlin with two other Kansas City police officers, and an officer of the Jackson County Sheriff's Patrol, executed the warrant against Distributors. Distributors' stock of magazines runs "in hundreds of thousands. . . probably closer to a million copies." The officers examined the publications in the stock on the main floor of the establishment, not confining themselves to Lieutenant Coughlin's original list. They seized all magazines which "in our judgment" were obscene; when an officer thought "a magazine ought to be picked up" he seized all copies of it. After three hours the examination was completed and the magazines seized were "hauled away in a truck and put on the fifteenth floor of the courthouse." A substantially similar procedure was followed at each of the five newsstands. Approximately 11,000 copies of 280 publications,

[7] He bought a copy of the same magazine at three of the stands, a copy of another edition of this magazine at a fourth stand, and a copy of one other magazine at the fifth stand.

principally magazines but also some books and photographs, were seized at the six places.[8]

The circuit judge fixed October 17 for the hearing, which was later continued to October 23. Timely motions were made by the appellants to quash the search warrants and to suppress as evidence the property seized, and for the immediate return of the property. The motions were rested on a number of grounds but we are concerned only with the challenge to the application of the procedures in the context of the protections for free speech and press assured against state abridgment by the Fourteenth Amendment.[9] Unconstitutionality in violation of the Fourteenth Amendment was asserted because the procedures as applied (1) allowed a seizure by police officers "without notice or any hearing afforded to the movants prior to seizure . . . for the purpose of determining whether or not these . . . publications are obscene. . . ," and (2) because they "allowed police officers and deputy sheriffs to decide and make a judicial determination after the warrant was issued as to which . . . magazines were . . . obscene . . . and were subject to seizure, impairing movants' freedom of speech and publication." The circuit judge reserved ruling on the motions and heard testimony of the police officers concerning the events surrounding the issuance and execution of the several warrants. On December 12, 1957, the circuit judge filed an unreported opinion in which

[8] The publications seized included so-called "girlie" magazines, nudist magazines, treatises and manuals on sex, photography magazines, cartoon and joke books and still photographs.

[9] Because of the result which we reach, it is unnecessary to decide other constitutional questions raised by the appellants, (1) whether the Missouri statutes are invalid on their face as authorizing an unconstitutional censorship and previous restraint of publications; (2) whether the Missouri courts applied an unconstitutional test of obscenity; and (3) whether the publications condemned are obscene under the test of *Roth* v. *United States*, 354 U. S. 476.

he overruled the several motions and found that 100 of the 280 seized items were obscene. A judgment thereupon issued directing that the 100 items, and all copies thereof, "shall be retained by the Sheriff of Jackson County . . . as necessary evidence for the purpose of possible criminal prosecution or prosecutions, and, when such necessity no longer exists, said Sheriff . . . shall publicly destroy the same by burning within 30 days thereafter"; it ordered further that the 180 items, not found to be obscene, and all copies thereof, "shall be returned forthwith by the Sheriff to the rightful owner or owners. . . ."

I.

The use by government of the power of search and seizure as an adjunct to a system for the suppression of objectionable publications is not new. Historically the struggle for freedom of speech and press in England was bound up with the issue of the scope of the search and seizure power. See generally, Siebert, Freedom of the Press in England, 1476–1776; Hanson, Government and the Press, 1695–1763. It was a principal instrument for the enforcement of the Tudor licensing system. The Stationers' Company was incorporated in 1557 to help implement that system and was empowered "to make search whenever it shall please them in any place, shop, house, chamber, or building or any printer, binder or bookseller whatever within our kingdom of England or the dominions of the same of or for any books or things printed, or to be printed, and to seize, take hold, burn, or turn to the proper use of the foresaid community, all and several those books and things which are or shall be printed contrary to the form of any statute, act, or proclamation, made or to be made . . . ." [10]

[10] 1 Arber, Transcript of the Registers of the Company of Stationers of London, 1554–1640 A. D., p. xxxi.

An order of council confirmed and expanded the Company's power in 1566,[11] and the Star Chamber reaffirmed it in 1586 by a decree "That it shall be lawful for the Wardens of the said Company for the time being or any two of the said Company thereto deputed by the said Wardens, to make search in all workhouses, shops, warehouses of printers, booksellers, bookbinders, or where they shall have reasonable cause of suspicion, and all books [etc.] . . . contrary to . . . these present Ordinances to stay and take to her Majesty's use . . . ." [12] Books thus seized were taken to Stationers' Hall where they were inspected by ecclesiastical officers, who decided whether they should be burnt. These powers were exercised under the Tudor censorship to suppress both Catholic and Puritan dissenting literature.[13]

Each succeeding regime during turbulent Seventeenth Century England used the search and seizure power to suppress publications. James I commissioned the ecclesiastical judges comprising the Court of High Commission "to enquire and search for . . . all heretical schismatical and seditious books, libels, and writings, and all other books, pamphlets and portraitures offensive to the state or set forth without sufficient and lawful authority in that behalf, . . . and the same books [etc.] and their printing-presses themselves likewise to seize and so to order and dispose of them . . . as they may not after serve or be employed for any such unlawful use . . . ." [14] The Star Chamber decree of 1637, re-enacting the requirement that all books be licensed, continued the broad powers of the Stationers' Company to enforce the licensing laws.[15]

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[11] Elton, The Tudor Constitution, p. 106.

[12] Elton, *supra*, pp. 182–183.

[13] Siebert, *supra*, pp. 83, 85–86, 97.

[14] Siebert, *supra*, p. 139, citing Pat. Rol. 9, Jac. I, Pt. 18; *id.*, II, Pt. 15.

[15] 4 Arber, *supra*, pp. 529–536.

During the political overturn of the 1640's Parliament on several occasions asserted the necessity of a broad search and seizure power to control printing. Thus an order of 1648 gave powers to the searchers "to search in any hour or place where there is just cause of suspicion, that Presses are kept and employed in the printing of scandalous and lying pamphlets, . . . [and] to seize such scandalous and lying pamphlets as they find upon search . . . ." [16] The restoration brought a new licensing act in 1662. Under its authority "messengers of the press" operated under the secretaries of state, who issued executive warrants for the seizure of persons and papers. These warrants, while sometimes specific in content, often gave the most general discretionary authority. For example, a warrant to Roger L'Estrange, the Surveyor of the Press, empowered him to "seize all seditious books and libels and to apprehend the authors, contrivers, printers, publishers, and dispersers of them," and to "search any house, shop, printing room, chamber, warehouse, etc. for seditious, scandalous or unlicensed pictures, books, or papers, to bring away or deface the same, and the letter press, taking away all the copies. . . ." [17] Another warrant gave L'Estrange power "to search for & seize authors, contrivers, printers, . . . publishers, dispensers, & concealers of treasonable, schismaticall, seditious or unlicensed books, libells, pamphlets, or papers . . . together with all copys exemplaryes of such Books, libells, pamphlets or paper as aforesaid." [18]

Although increasingly attacked, the licensing system was continued in effect for a time even after the Revolution of 1688 and executive warrants continued to issue for the search for and seizure of offending books. The Sta-

[16] Siebert, *supra*, 214–215, note 72.

[17] Siebert, *supra*, p. 254, citing Minute Entry Book 5, p. 177.

[18] Siebert, *supra*, p. 256, citing Entry Book, Chas. II, 1664, Vol. 21, p. 21; also Vol. 16, p. 130.

tioners' Company was also ordered "to make often and diligent searches in all such places you or any of you shall know or have any probable reason to suspect, and to seize all unlicensed, scandalous books and pamphlets . . . ." [19] And even when the device of prosecution for seditious libel replaced licensing as the principal governmental control of the press,[20] it too was enforced with the aid of general warrants—authorizing either the arrest of all persons connected with the publication of a particular libel and the search of their premises, or the seizure of all the papers of a named person alleged to be connected with the publication of a libel.[21]

Enforcement through general warrants was finally judicially condemned in England. This was the consequence of the struggle of the 1760's between the Crown and the opposition press led by John Wilkes, author and editor of the North Briton. From this struggle came the great case of *Entick* v. *Carrington,* 19 How. St. Tr., col. 1029, which this Court has called "one of the landmarks of English liberty." *Boyd* v. *United States,* 116 U. S. 616, 626. A warrant based on a charge of seditious libel issued for the arrest of Entick, writer for an opposition paper, and for the seizure of all his papers. The

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[19] Cal. St. P., Dom. Ser., 1690–1691, p. 74.

[20] One of the primary objections to licensing was its enforcement through search and seizure. The House of Commons' list of reasons why the licensing act should not be renewed included: "Because that Act subjects all Mens Houses, as well Peers as Commoners, to be searched at any Time, either by Day or Night, by a Warrant under the Sign Manual, or under the Hand of One of the Secretaries of State, directed to any Messenger, if such Messenger shall upon probable Reason suspect that there are any unlicensed Books there; and the Houses of all Persons free of the Company of Stationers are subject to the like Search, on a Warrant from the Master and Wardens of the said Company, or any One of them." 15 Journal of the House of Lords, April 18, 1695, p. 546.

[21] Siebert, *supra,* pp. 374–376.

officers executing the warrant ransacked Entick's home for four hours and carted away great quantities of books and papers. Lord Camden declared the general warrant for the seizure of papers contrary to the common law, despite its long history. Camden said: "The power so assumed by the secretary of state is an execution upon all the party's papers, in the first instance. His house is rifled; his most valuable secrets are taken out of his possession, before the paper for which he is charged is found to be criminal by any competent jurisdiction, and before he is convicted either of writing, publishing or being concerned in the paper." Col. 1064. Camden expressly dismissed the contention that such a warrant could be justified on the grounds that it was "necessary for the ends of government to lodge such a power with a state officer; and . . . better to prevent the publication before than to punish the offender afterwards." Col. 1073. In *Wilkes* v. *Wood*, 19 How. St. Tr., col. 1153, Camden also condemned the general warrants employed against John Wilkes for his publication of issue No. 45 of the North Briton. He declared that these warrants, calling for the arrest of unnamed persons connected with the alleged libel and seizure of their papers, amounted to a "discretionary power given to messengers to search wherever their suspicions may chance to fall. If such a power is truly invested in a secretary of state, and he can delegate this power, it certainly may affect the person and property of every man in this kingdom, and is totally subversive of the liberty of the subject." *Id.*, col. 1167.[22]

[22] A contemporary London pamphlet summed up the widespread indignation against the use of the general warrant for the seizure of papers: "In such a party-crime, as a public-libel, who can endure this assumed authority of taking all papers indiscriminately? . . . where there is even a charge against one particular paper, to seize *all*, of every kind, is extravagant, unreasonable and inquisitorial. It is infamous in theory, and downright tyranny and despotism in prac-

This history was, of course, part of the intellectual matrix within which our own constitutional fabric was shaped. The Bill of Rights was fashioned against the background of knowledge that unrestricted power of search and seizure could also be an instrument for stifling liberty of expression. For the serious hazard of suppression of innocent expression inhered in the discretion confided in the officers authorized to exercise the power.

II.

The question here is whether the use by Missouri in this case of the search and seizure power to suppress obscene publications involved abuses inimical to protected expression. We held in *Roth* v. *United States*, 354 U. S. 476, 485,[23] that "obscenity is not within the area of constitutionally protected speech or press." But in *Roth* itself we expressly recognized the complexity of the test of obscenity fashioned in that case, and the vital necessity in its application of safeguards to prevent denial of "the

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tice." Father of Candor, A Letter Concerning Libels, Warrants, and the Seizure of Papers, p. 48 (2d ed. 1764, J. Almon printer).

See generally Lasson, The History and Development of the Fourth Amendment, pp. 42–50; Hanson, Government and the Press, 1695–1763, pp. 29–32, 49–50. An even broader form of general warrant was the writ of assistance, which met such vigorous opposition in the American Colonies prior to the Revolution. Unlike the warrants of the North Briton affair and *Entick* v. *Carrington*, which were at least concerned with a particular designated libel, these writs empowered the executing officer to seize any illegally imported goods or merchandise. Moreover, in addition to authorizing search without limit of place, they had no fixed duration. In effect, complete discretion was given to the executing officials; in the words of James Otis, their use placed "the liberty of every man in the hands of every petty officer." Tudor, Life of James Otis (1823), p. 66. See Lasson, *supra*, pp. 51–78.

[23] This holding applied also to the obscenity question raised under the Fourteenth Amendment in *Alberts* v. *California*, decided in the same opinion.

protection of freedom of speech and press for material which does not treat sex in a manner appealing to prurient interest." *Id.*, p. 488. We have since held that a State's power to suppress obscenity is limited by the constitutional protections for free expression. In *Smith* v. *California*, 361 U. S. 147, 155, we said, "The existence of the State's power to prevent the distribution of obscene matter does not mean that there can be no constitutional barrier to any form of practical exercise of that power," inasmuch as "Our holding in *Roth* does not recognize any state power to restrict the dissemination of books which are not obscene." *Id.*, p. 152. We therefore held that a State may not impose absolute criminal liability on a bookseller for the possession of obscene material, even if it may dispense with the element of *scienter* in dealing with such evils as impure food and drugs. We remarked the distinction between the cases: "There is no specific constitutional inhibition against making the distributors of food the strictest censors of their merchandise, but the constitutional guarantees of the freedom of speech and of the press stand in the way of imposing a similar requirement on the bookseller." *Id.*, pp. 152–153. The Missouri Supreme Court's assimilation of obscene literature to gambling paraphernalia or other contraband for purposes of search and seizure does not therefore answer the appellants' constitutional claim, but merely restates the issue whether obscenity may be treated in the same way. The authority to the police officers under the warrants issued in this case, broadly to seize "obscene . . . publications," poses problems not raised by the warrants to seize "gambling implements" and "all intoxicating liquors" involved in the cases cited by the Missouri Supreme Court. 334 S. W. 2d, at 125. For the use of these warrants implicates questions whether the procedures leading to their issuance and surrounding their execution were adequate to avoid suppression of constitutionally protected pub-

lications. ". . . [T]he line between speech unconditionally guaranteed and speech which may legitimately be regulated, suppressed, or punished is finely drawn . . . . The separation of legitimate from illegitimate speech calls for . . . sensitive tools . . . ." *Speiser* v. *Randall*, 357 U. S. 531, 525.[24] It follows that, under the Fourteenth Amendment, a State is not free to adopt whatever procedures it pleases for dealing with obscenity as here involved without regard to the possible consequences for constitutionally protected speech.

We believe that Missouri's procedures as applied in this case lacked the safeguards which due process demands to assure nonobscene material the constitutional protection to which it is entitled. Putting to one side the fact that no opportunity was afforded the appellants to elicit and contest the reasons for the officer's belief, or otherwise to argue against the propriety of the seizure to the issuing judge, still the warrants issued on the strength of the conclusory assertions of a single police officer, without any scrutiny by the judge of any materials considered by the complainant to be obscene. The warrants gave the broadest discretion to the executing officers; they merely repeated the language of the statute and the complaints, specified no publications, and left to the individual judgment of each of the many police officers involved the selection of such magazines as in his view constituted "obscene . . . publications." So far as ap-

[24] Lord Camden in *Entick* v. *Carrington* recognized that there was no justification for the abuse of the search and seizure power in suppressing seditious libel, even if the view were accepted that "men ought not to be allowed to have such evil instruments in their keeping." 19 How. St. Tr., col. 1072. He said, "If [libels may be seized], I am afraid, that all the inconveniences of a general seizure will follow upon a right allowed to seize a part. The search in such cases will be general, and every house will fall under the power of a secretary of state to be rummaged before proper conviction." *Id.*, col. 1071.

pears from the record none of the officers except Lieutenant Coughlin had previously examined any of the publications which were subsequently seized. It is plain that in many instances, if not in all, each officer actually made *ad hoc* decisions on the spot and, gauged by the number of publications seized and the time spent in executing the warrants, each decision was made with little opportunity for reflection and deliberation. As to publications seized because they appeared on the Lieutenant's list, we know nothing of the basis for the orginal judgment that they were obscene. It is no reflection on the good faith or judgment of the officers to conclude that the task they were assigned was simply an impossible one to perform with any realistic expectation that the obscene might be accurately separated from the constitutionally protected. They were provided with no guide to the exercise of informed discretion, because there was no step in the procedure before seizure designed to focus searchingly on the question of obscenity. See generally 1 Chafee, Government and Mass Communications, pp. 200–218. In consequence there were suppressed and withheld from the market for over two months 180 publications not found obscene.[25] The fact that only one-third of the publications seized were finally condemned strengthens the conclusion that discretion to seize allegedly obscene materials cannot be confided to law enforcement officials

[25] Among the publications ordered returned were such titles as "The Dawn of Rational Sex Ethics," "Sex Symbolism," "Notes on Cases of Sexual Suppression," "Your Affections, Emotions and Feelings," "Sexual Impotence, Its Causes and Treatments," "The Psychology of Sex Life," "Freud on Sleep and Sexual Dreams," "The Determination of Sex," "Sex and Psychoanalysis," "Artificial Insemination," "Syphilis, A Treatise for the American Public," "What You Should Know About Sexual Impotency," "Variations in Sexual Behavior," "Sex Life in Marriage," "Psychopathia Sexualis," "The Sex Technique in Marriage," "Sexual Deviations," "Sex Practice in Later Years," and "Marriage, Sex, and Family Problems."

without greater safeguards than were here operative. Procedures which sweep so broadly and with so little discrimination are obviously deficient in techniques required by the Due Process Clause of the Fourteenth Amendment to prevent erosion of the constitutional guarantees.[26]

[26] English practice in such cases has placed greater restraint on the seizure power. Seizure of obscene material, as a prelude to condemnation, was authorized there by Lord Campbell's Obscene Publications Act of 1857, 20 & 21 Vict., c. 83. As originally proposed that statute would have allowed search for and seizure of obscene matter either under authority granted by magistrates or on warrants granted by the Chief Commissioner of Police. Moreover, the affidavit for obtaining a warrant would have been required to contain merely the statement that the person making it had reasonable ground for suspicion that obscene publications were kept on the premises to be searched. See 146 Hansard's Parliamentary Debates, 3d Series, p. 866. These provisions met vigorous opposition in Parliament. A number of members emphasized that the difficulty of defining obscenity made broad search powers in police hands extremely dangerous. See, *id.*, pp. 330–332, 1360–1362, 147 Hansard, *supra*, pp. 1863–1864. As a result amendments were adopted removing the grant of authority to the police commissioner to authorise a search and seizure, requiring greater specificity in the allegations before a warrant could be issued, and providing that warrants could issue only for the seizure of books the publication of which would constitute a common-law misdemeanor. Lord Lyndhurst, draftsman of these amendments, explained: "I have now provided that the person shall swear that he has reason to believe, and that he does believe, that there are such publications in such a place, and shall further state to the magistrate the reasons which lead to that belief. Nor does it stop there. The most material Amendment is, that he must state what the publications are, and that they are of such a nature that, if published, the party publishing them will be guilty of a misdemeanour. The magistrate must also be satisfied that the case is a proper one for a prosecution . . . ." 146 Hansard, *supra*, at p. 1360. The Lord Chancellor summarized the effect of the changes: "As the Bill now stood, these search-warrants would only be granted after great precautions . . . ." *Id.*, p. 1362.

According to a recent summary of procedures to obtain a warrant under that Act, a police officer would ordinarily buy copies of a work

III.

The reliance of the Missouri Supreme Court upon *Kingsley Books, Inc.*, v. *Brown*, 354 U. S. 436, is misplaced. The differences in the procedures under the New York statute upheld in that case and the Missouri procedures as applied here are marked. They amount to the distinction between "a 'limited injunctive remedy,' under closely defined procedural safeguards, against the sale and distribution of written and printed matter found after due trial to be obscene," *Kingsley Books*, *supra*, at 437, and a scheme which in operation inhibited the circulation of publications indiscriminately because of the absence of any such safeguards. *First*, the New York injunctive proceeding was initiated by a complaint filed with the court which charged that a particular named obscene publication had been displayed, and to which were annexed copies of the publication alleged to be obscene.[27] The court in restraining distribution pending

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he suspected of obscenity. They would be examined by the police and sent to the Director of Public Prosecutions. The latter would return them with advice as to whether a warrant should be applied for. If a decision were made to seek a warrant, the publications would be laid before a magistrate with the sworn affidavit of the officer, in order that he might be satisfied that they were of the character necessary to justify seizure. See Memorandum of the Association of Chief Police Officers of England and Wales, Minutes of Evidence Taken Before the Select Committee of the House of Commons and the Obscene Publications Bill, 1956–1957, pp. 132–136. See also, *id.*, p. 23.

The Act was replaced by the Obscene Publications Act of 1959, 7 & 8 Eliz. II, c. 66. See 23 Mod. L. Rev. 285.

[27] The feasibility of particularization in complaint and warrant in a case such as the present is apparent, since the publications were sold on newsstands distributing to the public. Compare Lord Camden's remark in *Entick* v. *Carrington*, directed to the contention that a general warrant might be justifiable as a means of uncovering evidence of crime: "If . . . a right of search for the sake of

final judicial determination of the claim, thus had the allegedly obscene material before it and could exercise an independent check on the judgment of the prosecuting authority at a point before any restraint took place. *Second*, the restraints in *Kingsley Books*, both temporary and permanent, ran only against the named publication; no catchall restraint against the distribution of all "obscene" material was imposed on the defendants there, comparable to the warrants here which authorized a mass seizure and the removal of a broad range of items from circulation.[28] *Third*, *Kingsley Books* does not support the proposition that the State may impose the extensive restraints imposed here on the distribution of these publications prior to an adversary proceeding on the issue of obscenity, irrespective of whether or not the material is legally obscene. This Court expressly noted there that the State was not attempting to punish the distributors for disobedience of any interim order entered before hearing. The Court pointed out that New York might well construe its own law as not imposing any punishment for violation of an interim order were the book found not obscene after due trial. 354 U. S., at 443, n. 2. But there is no doubt that an effective restraint—indeed the most effec-

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discovering evidence ought in any case to be allowed, this crime [seditious libel] above all others ought to be excepted, as wanting such a discovery less than any other. It is committed in open daylight, and in the face of the world; . . ." 19 How. St. Tr., col. 1074.

[28] The trial judge in *Kingsley Books* refused to enjoin the distribution of future issues of the publication in question, stating: "[u]nless the work be before the court at the time of the hearing at which the injunction is sought, it is inappropriate to make a judicial determination with respect to it. In respect of this feature of the case, the plaintiff seeks a likely trespass upon a constitutionally protected area, and the court must reject that prayer." 142 N. Y. S. 2d 735, 751. Cf. *Near* v. *Minnesota ex rel. Olson*, 283 U. S. 697.

tive restraint possible—was imposed prior to hearing on the circulation of the publications in this case, because all copies on which the police could lay their hands were physically removed from the newsstands and from the premises of the wholesale distributor. An opportunity comparable to that which the distributor in *Kingsley Books* might have had to circulate the publication despite the interim restraint and then raise the claim of nonobscenity by way of defense to a prosecution for doing so was never afforded these appellants because the copies they possessed were taken away. Their ability to circulate their publications was left to the chance of securing other copies, themselves subject to mass seizure under other such warrants. The public's opportunity to obtain the publications was thus determined by the distributor's readiness and ability to outwit the police by obtaining and selling other copies before they in turn could be seized. In addition to its unseemliness, we do not believe that this kind of enforced competition affords a reasonable likelihood that nonobscene publications, entitled to constitutional protection, will reach the public. A distributor may have every reason to believe that a publication is constitutionally protected and will be so held after judicial hearing, but his belief is unavailing as against the contrary judgment of the police officer who seizes it from him.[29] Finally, a sub-

[29] Cf. Freund, The Supreme Court and Civil Liberties, 4 Vand. L. Rev. 533, 539.

Blackstone's often-quoted formulation of the principle of freedom of the press, though restricted to the prohibition of "*previous* restraints upon publications," nevertheless acknowledged the importance of an adjudicatory procedure as a protection against the suppression of inoffensive publications. He wrote: "to punish (as the law does at present) any dangerous or offensive writings which, when published, shall *on a fair and impartial trial be adjudged of a pernicious tendency*, is necessary for the preservation of peace and good order . . . ." 4 Commentaries, pp. 151–152. (Emphasis added.) Compare Butler, J., dissenting in *Near* v. *Minnesota ex rel. Olson*,

division of the New York statute of *Kingsley Books* required that a judicial decision on the merits of obscenity be made within two days of trial, which in turn was required to be within one day of the joinder of issue on the request for an injunction.[30] In contrast, the Missouri statutory scheme drawn in question here has no limitation on the time within which decision must be made, only a provision for rapid trial of the issue of obscenity. And in fact over two months elapsed between seizure and decision.[31] In these circumstances the restraint on the circulation of publications was far more thoroughgoing and drastic than any restraint upheld by this Court in *Kingsley Books*.

Mass seizure in the fashion of this case was thus effected without any safeguards to protect legitimate expression. The judgment of the Missouri Supreme Court sustaining the condemnation of the 100 publications therefore cannot be sustained. We have no occasion to reach the question of the correctness of the finding that the publications are obscene. Nor is it necessary for us to decide in this case whether Missouri lacks all power under its statutory

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supra, p. 723: "The decision of the Court in this case declares Minnesota and every other State powerless to restrain by injunction the business of publishing and circulating among the people malicious, scandalous and defamatory periodicals that *in due course of judicial procedure has been adjudged to be a public nuisance*." (Emphasis added.)

[30] This provision was not directly implicated in *Kingsley Books* because the parties had waived the provision for immediate trial.

[31] Compare the objection of the House of Commons to renewal of licensing: "Because that Act appoints no Time wherein the Archbishop, or Bishop of London, shall appoint a learned Man, or that One or more of the Company of Stationers shall go to the Custom-house, to view imported Books; so that they or either of them may delay it till the Importer may be undone, by having so great a Part of his Stock lie dead . . . ." 15 Journal of the House of Lords, April 18, 1695, p. 546.

scheme to seize and condemn obscene material. Since a violation of the Fourteenth Amendment infected the proceedings, in order to vindicate appellants' constitutional rights the judgment is reversed, and the cause is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

No. 225.—October Term, 1960.

William Marcus, et al., Appellants, *v.* Search Warrants of Property at 104 East Tenth Street, Kansas City, Missouri, et al.	On Appeal From the Supreme Court of Missouri.

[June 19, 1961.]

Mr. Justice Black, whom Mr. Justice Douglas joins, concurring.

The warrant used to search appellants' premises made no attempt specifically to describe the "things to be seized," as the Fourth Amendment requires. As the historical summary in the Court's opinion demonstrates, a major purpose of adopting that Amendment was to bar the Federal Government from using precisely this kind of general warrant to support "unreasonable searches and seizures" of the "papers" and "effects" of persons having possession of them. See especially *Entick* v. *Carrington*, 19 Howell's State Trials 1029, at 1073–1076; *Boyd* v. *United States*, 116 U. S. 616, 624–630; *Frank* v. *Maryland*, 359 U. S. 360, 374 (dissenting opinion). It is my view that the Fourteenth Amendment makes the Fourth Amendment applicable to the States to the full extent of its terms, just as it applies to the Federal Government. See *Adamson* v. *California*, 332 U. S. 46, 68 (dissenting opinion). Only last Term we said that in *Wolf* v. *Colorado*, 338 U. S. 25, "it was unequivocally determined by a unanimous Court that the Federal Constitution, by virtue of the Fourteenth Amendment, prohibits unreasonable searches and seizures by state

officers." *Elkins* v. *United States*, 364 U. S. 206, 213. And in *Mapp* v. *Ohio*, decided today, it is said that "[s]ince the Fourth Amendment's right of privacy has been declared enforceable against the States through the Due Process Clause of the Fourteenth, it is enforceable against them by the same sanction of exclusion as is used against the Federal Government." Since the State has used a general warrant in this case in violation of the prohibitions of the Fourth and Fourteenth Amendments, I concur in reversal of the judgment.